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> The mood and temper of the public
> in regard to the treatment of crime
> and criminals is one of the most unfailing
> tests of the civilization of any country.
>
> Winston Churchill, 1912[1]

I. INTRODUCTION

Imprisonment as practiced in our country today is an experiment in punishment and reformation that began about 200 years ago.[2] As a method of changing human behavior, it has been a failure. There is an "endless, self-defeating cycle of imprisonment, release, and reimprisonment which fails to alter undesirable attitudes and behavior."[3]

Today, our criminal law dockets are full, our jails are overcrowded, and almost every state is enlarging its correctional facilities to accommodate more inmates. With more than one million people behind bars, our highly civilized country can now claim the dubious distinction of imprisoning more of its citizens, per capita, than any other country.[4]

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1. *Quoted in* Rhem v. Malcolm, 371 F. Supp. 594, 596-97 (S.D.N.Y. 1974).

2. For an excellent general discussion on the early development of American prisons, see DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM 78-108 (1971), and HARRY E. BARNES, THE REPRESSION OF CRIME (1926).

3. President Johnson's Message to Congress, 1 PUB. PAPERS 263, 264 (Mar. 8, 1965).

4. A recent study by The Sentencing Project, a nonprofit research organization, finds the American incarceration rate to be 426 people per 100,000, well in excess of South Africa (333), the second-highest imprisonment rate, and the then Soviet Union (268), the third in overall incarceration. *The Nation: U.S. Leads in Share of*

The legal status of those persons convicted of committing a criminal act was long ignored by the courts. A century ago, the criminal offender was regarded as a "slave of the State,"[5] thereby providing prison administrators' acts with virtual immunity from judicial review. More recently, the courts took a "hands-off" approach to the administration of prisons.[6] The loss of many of the most important basic rights in the institutional setting was blithely accepted as a necessary condition of rehabilitation, discipline, or security.

Today, with judicial prodding, prisons are beginning to shed their "punitive heritage."[7] "[T]he soul-chilling inhumanity of conditions in American prisons has been thrust upon the judicial conscience."[8] The Supreme Court, although recognizing that prisoners are not wholly without protection of the Constitution,[9] has continually failed to honor all but the most basic of human needs. The lower federal courts, however, have emerged as the force behind the efforts to ameliorate inhumane conditions in our prisons.[10]

For the most part, federal judicial intervention has been beneficial to the correctional system and the broader community.[11] However, progress toward providing both

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Residents in Prison, ATLANTA J. & CONST., Jan. 5, 1991, at A5.

In 1988, the latest year for which figures are available, the Federal Bureau of Justice Statistics indicated that about one million people were in prison or jails, and that 2.3 million people were on probation. In the last decade, the population of prisons had "increased by 45 percent while the number of those on probation jumped by 75 percent." Stephen Labaton, *Glutted Probation System Puts Communities in Peril*, N.Y. TIMES, June 19, 1990, at A1, A16.

5. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

6. For a historical review of the "hands-off" theory, see Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

7. Wolff v. McDonnell, 418 U.S. 539, 598 (1974) (Douglas, J., dissenting in part, concurring in the result in part).

8. Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 684 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied sub nom.* Hall v. Inmates of Suffolk County Jail, 419 U.S. 977 (1974).

9. *Wolff*, 418 U.S. at 555-57.

10. *See* Rhodes v. Chapman, 452 U.S. 337, 359 (1981) (Brennan, J., concurring in the judgment).

11. *Id.* at 359-60 (citing M. KAY HARRIS & DUDLEY D. SPILLER, JR., U.S. DEP'T OF JUSTICE, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 21 (1977)).

Justice Brennan also quotes prison officials who have acknowledged that judicial intervention has helped them gain needed reform. *Id.* at 360-61. For example, the Commissioner of Corrections of New York City, stated: "Federal courts may be the last resort for us . . . . If there's going to be change, I think

constitutional rights and humane conditions of confinement in the nation's prisons has been slow and uneven despite this pressure.

Prisoner litigation has posed a sharp choice between respect for human dignity and the need for prison security. Prison administrators have the difficult task of preserving security in an explosive environment. To ensure that the courts afford appropriate deference to those charged with operating a prison, the Supreme Court has decided that a prison regulation is valid if it is "reasonably related to legitimate penological interests"[12] and does not represent "an exaggerated response to those concerns."[13]

This Article in Part II explores the rise of the penitentiary system in our country. Part III examines the development of the Supreme Court's position on prisoners' rights and conditions of confinement. Part IV elaborates on this development under the Court's newly minted "reasonably related" standard. Part V discusses the underlying reasons why the Court counsels judicial restraint and deference to the judgment of prison administrations; nevertheless, this Article argues that such judgment is often based on misplaced assumptions of administrative expertise and an overly narrow view of federalism and the separation of powers. Part VI maintains that there is a need to reach a more realistic "mutual accommodation between institutional needs and objectives and the provisions of the Constitution."[14]

This Article contends that the Court's amorphous "reasonableness" standard makes it too easy for prison officials to restrict basic constitutional rights since they may be

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the federal courts are going to have to force cities and states to spend more money on their prisons . . . . I look on the courts as a friend." *Id.* at 360 (quoting Stephen H. Gettinger, *"Cruel and Unusual" Prisons*, 3 CORRECTIONS MAG., Dec. 1977, at 3, 5).

Similarly, the Commissioner of the Minnesota Department of Corrections testified before a congressional committee that lawsuits brought on behalf of prison inmates have upgraded correctional institutions and the development of procedural safeguards regarding basic constitutional rights. "There is no question in my mind that had such court intervention not taken place, these fundamental improvements would not have occurred." *Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 409 (1977) (prepared statement of Kenneth F. Schoen).

12. Turner v. Safley, 482 U.S. 78, 89 (1987).

13. *Id.* at 87, 90.

14. Wolff v. McDonnell, 418 U.S. 539, 556 (1974).

disregarded "whenever the imagination of the warden produces a plausible security concern."[15] The focus should be on the impact of the constitutional deprivation on the inmate and the availability of less restrictive, but reasonable, alternatives. The guidepost should be to accord, whenever realistically possible, respect for the human dignity of the prisoner.

II. HISTORICAL ORIGINS

A. Development of the Pennsylvania and Auburn Prison Systems

Imprisonment as the most common method of punishment for the commission of a crime is a relatively recent phenomenon. In late eighteenth century England, jails mainly held debtors and those accused of committing crimes. Once convicted, corporal punishment, execution, or banishment were the common forms of punishment. Incarceration was very rare.[16]

Colonial America's treatment of prisoners was similar in method to its European counterpart. Jails were primarily used for holding debtors and those accused of crime.[17] Punishment consisted of public whipping, branding, carting, or displaying in the pillories or stocks. For the more serious offenses, the offender might have been burned at the stake, hanged, or banished.[18]

It was not until the latter half of the eighteenth century that imprisonment in America supplanted corporal punishment as the predominant means of dealing with the convicted criminal. Just prior to the outbreak of the Revolutionary War, the State of Pennsylvania began an experiment that radically changed the purpose of prisons. Led by Quaker reformists, the

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15. *Turner*, 482 U.S. at 100-01 (Stevens, J., concurring in part and dissenting in part).

16. Leonard G. Leverson, *Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-Examination*, 18 HARV. C.R.-C.L. L. REV. 409, 412-13 (1983); *see also* WINIFRED A. ELKIN, THE ENGLISH PENAL SYSTEM 110-11 (1957); RALPH B. PUGH, IMPRISONMENT IN MEDIEVAL ENGLAND (1968). "In early society, crimes against the public welfare were punished by summary execution," exile, or corporal punishment, according to the nature of the crime and custom of the group. BARNES, *supra* note 2, at 156.

17. Jails were rarely used as a place of long-term confinement. At each session of the court, a "gaol delivery" emptied the jail of its inmates. Leverson, *supra* note 16, at 412.

18. *See* DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776, at 223 (1974).

Pennsylvania Assembly passed several statutes transforming jails into penitentiaries. Richard Wistar, a member of the Society of Friends, was astonished by the misery of the inmates of the provincial jail in Philadelphia. Some of the inmates had recently starved to death, so Wistar had soup prepared in his house and distributed it to the inmates of the jail.[19] Others also became interested in the prison system and formed The Philadelphia Society for Assisting Distressed Prisoners.[20] Unfortunately, reform was delayed by the British occupation of the city, which put an end to the Society of Friends' activities.[21]

After the American Revolution, the publicity given to the deplorable conditions in jail continued, promoting the formation of The Philadelphia Society for Alleviating the Miseries of Public Prisons. This organization, the first of the modern prison reform movements, set forth with clear and concise terms, in its preamble, the purpose of the society.

> [W]hen we reflect upon the miseries which penury, hunger, cold, unnecessary severity, unwholesome apartments, and guilt, (the usual attendants of prisons,) involve with them, it becomes us to extend our compassion to that part of mankind, who are the subjects of these miseries. By the aids of humanity, their undue and illegal sufferings may be prevented; the links which should bind the whole family of mankind together, under all circumstances, be preserved unbroken; and such degrees and modes of punishment may be discovered and suggested, as may, instead of continuing habits of vice, become the means of restoring our fellow creatures to virtue and happiness.[22]

Concurrent with concern for prison reform, a number of prominent citizens of Philadelphia, led by Benjamin Franklin, organized a movement for the reform of Pennsylvania's barbarous criminal code. By 1794, a systematic revision of the code was completed, abolishing the death penalty for most crimes and totally eliminating corporal punishment of any type. In its place was substituted imprisonment as the normal sentence for

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19. BARNES, *supra* note 2, at 97-98.
20. *Id.* at 98.
21. *Id.*
22. ROBERTS VAUX, NOTICES OF THE ORIGINAL, AND SUCCESSIVE EFFORTS TO IMPROVE THE DISCIPLINE OF THE PRISON OF PHILADELPHIA, AND TO REFORM THE CRIMINAL CODE OF PENNSYLVANIA 11 (1826).

felons.[23] This break with colonial savagery of punishment necessitated the establishment of a prison system to house the convicted.

In 1790, the first American penitentiary was established in Philadelphia. The Pennsylvania General Assembly, responding to the sentiments of Quaker-led reformists, passed a series of laws to transform part of Philadelphia's Walnut Street Jail into a penitentiary.[24] The Jail was constructed to confine the worst types of felons in solitary confinement.[25] The program, soon to become known as the "Pennsylvania system," provided that the prisoner be kept in continuous isolation, with all communication forbidden, except for religious advisors and official visitors.[26]

The reformists envisioned an institution where the convicted would ponder his crime in solitary confinement and in absolute silence. They believed that the penitentiary would provide a place of penitence where the convict, alone in his cell with only the Bible to comfort him, would necessarily "be compelled to reflect on the error of his ways, to listen to the reproaches of conscience, to the expostulations of religion."[27] Left in total solitude with no evils to distract him, the prisoner would reflect on his sins and repent. What the reformists actually hoped for were penitentiary houses where kindness and proper direction would enable the prisoner to begin his rehabilitation.

Presaging a modern-day problem, the Walnut Street Jail proved a complete failure.[28] The cells erected for the more hardened criminals were insufficient to accommodate all inmates of this category and thus solitary confinement could not be preserved. The Jail became so overcrowded that administration of the prison in the scientific manner thought necessary by the Quakers became impossible.

This overcrowding led Pennsylvania to erect the Western State Penitentiary near Pittsburgh in 1826 and the Eastern State Penitentiary, outside of Philadelphia, in 1829. The

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23. BARNES, *supra* note 2, at 101.
24. *Id.* at 102.
25. *Id.*; *see also* PAUL W. TAPPAN, CRIME, JUSTICE AND CORRECTION 605-06 (1960).
26. *See* Wolff v. McDonnell, 418 U.S. 539, 598 (1974) (Douglas, J., dissenting in part, concurring in the result in part).
27. GEORGE W. SMITH, A DEFENCE OF THE SYSTEM OF SOLITARY CONFINEMENT OF PRISONERS 75 (1833).
28. BARNES, *supra* note 2, at 102.

reformists were able to convince the legislature to enact their fundamental vision of penal administration—solitary confinement and hard labor.[29]

The Pennsylvania program was lavishly praised by its inspectors, affirming the wisdom of its reform supporters.

> Shut out from a tumultuous world, and separated from those equally guilty with himself, [the prisoner] can indulge his remorse unseen, and find ample opportunity for reflection and reformation. His daily intercourse is with good men, who, in administering to his necessities, animate his crushed hopes, and pour into his ear the oil of joy and consolation. He has abundance of light, air, and warmth; he has good and wholesome food; he has seasonable and comfortable clothing; he has the best of medical attendance; he has books to read, and ink and paper to communicate with his friends at stated periods; and weekly he enjoys the privilege of hearing God's holy word expounded by a faithful and zealous Christian minister.[30]

The Pennsylvania system was the precursor of other state reform movements.[31] The Philadelphia Society had taken the lead and had widely advertised its program. Determined to make its influence on prison reform felt nationwide, the Society corresponded extensively with executives of several states and widely distributed information about its program.[32]

It was only natural that Pennsylvania's progress caught the attention of New York's Governor John Jay, and that in his first message to the legislature, the chief executive recommended the reform of the New York criminal code.[33] Convinced that Pennsylvania had provided the desirable model, the New York legislature passed an act that, like its sister state, substantially reduced the list of capital crimes and substituted imprisonment for corporal punishment.[34]

Newgate Prison, built in New York's Greenwich Village, was opened in 1797 to accommodate inmates. Like its counterpart in Pennsylvania, the Newgate Prison rapidly became over-

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29. 1829 Pa. Laws 351-54.

30. BARNES, *supra* note 2, at 104 (quoting Report of the Inspectors of the Western Penitentiary, Legislative Documents 271 (1854)).

31. *Cf.* ORLANDO F. LEWIS, THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776-1845, at 206-07 (reprinted with the cooperation of The Correctional Association of New York, Patterson Smith 1967) (1922).

32. VAUX, *supra* note 22, at 34.

33. BARNES, *supra* note 2, at 105-06.

34. *Id.*

crowded,[35] requiring the construction of a new state prison in Auburn, New York. After a period of experimenting with the Pennsylvania system of total solitary confinement, Auburn adopted the congregate method of confinement. This change entailed nothing more than allowing the convicts to work together by day, with separation at night, but enforced silence at all times. Nevertheless, this change proved to be historically significant.

A virulent debate arose between the advocates of the Auburn and Pennsylvania systems which raged with intensity over several decades.[36] In addition, several European countries became interested and sent their official investigators to evaluate the new experimental prisons.[37]

Solitary confinement was the essential feature of the Pennsylvania scheme. The key to reforming the convict lay in separating him from evil influences and corrupt companions. "Blindfolded upon arrival, he was led to his cell where the blindfold was removed."[38] The solitary cell, large and well ventilated, and its small exercise yard, were his entire world. When the time came for his release he was blindfolded again and led out.[39] The Pennsylvania supporters argued that prisoners confined to their cells at all times did not have to be shepherded to meals or supervised in workshops; therefore guards would not have to be well trained, for their contact with these inmates would be minimal. The whip would rarely have to be used since prisoners in isolation have few opportunities to violate regulations. Furthermore, security was easy to maintain, since isolated inmates would find it difficult to formulate

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35. *Id.* at 106-07. A practice similar to that in effect in our overcrowded prisons was inaugurated. Each year as many convicts as admitted were pardoned in order to keep the prison population down to a reasonable number. *Id.* at 107.

36. ROTHMAN, *supra* note 2, at 81-83. See BARNES, *supra* note 2, at 114 n.55, for a comprehensive list of articles and pamphlets defending and condemning the Pennsylvania system.

37. BARNES, *supra* note 2, at 163. France dispatched Alexis de Tocqueville and Gustave Auguste de Beaumont; England sent Sir William Crawford; Prussia sent Dr. Nicholas H. Julius. Many wrote invaluable essays on their experiences. *See, e.g.*, GUSTAVE A. DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE (Herman R. Lantz ed., Francis Lieber trans., S. Ill. U. Press 1964) (1833).

38. NEW YORK STATE SPECIAL COMMISSION ON ATTICA, ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 7 (1972) [hereinafter ATTICA].

39. *Id.*

escape plans.[40]

The Auburn school countered that it was unnatural to leave inmates in solitary confinement for years at a time. They argued that total isolation was "at variance with the human constitution."[41] Minds broke under the strain of idle isolation. Far from reforming men, the practice contributed to insanity and bred despair. Of equal importance, by permitting convicts to work together in silent harmony, they could feel the satisfaction of hard work and contribute to the cost of their incarceration. Besides, the Pennsylvania system was more expensive to establish. The Auburn cells were smaller since they were primarily for sleeping, and not intended to encompass the convicts' entire universe. Aided by the growing recognition that it was economically cheaper to construct and maintain prisons under the Auburn plan, it eventually triumphed and became the dominant model for American prisons.[42]

The war between the two camps had dominated all thinking on corrections. In retrospect, it is hard to fathom the depth of the debate and to understand why it became so passionate. The main objective of both the Pennsylvania and Auburn systems was to deprive the convict of personal autonomy. Rules were designed to control his behavior in every detail. His every movement from waking to sleeping was monitored and controlled.[43] Both programs placed maximum emphasis on isolation in the prison and the establishment of a disciplined routine. In both, the inmate was kept in a separate cell at night and subject to the rule of absolute silence at all times. The focus was on the one difference rather than on the similarities of the two systems. The primary innovation of the congregate Auburn system was that inmates worked together during the day.

The narrowness of the content of the debate clearly indicated that there was widespread agreement on the institutional process. As one prison became overcrowded, another fortress-like institution was built. In New York, in 1825, Auburn prisoners helped build Sing Sing on the Hudson River,

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40. ROTHMAN, *supra* note 2, at 86.
41. *Id.* at 87.
42. BARNES, *supra* note 2, at 163-65.
43. *See generally* Richard G. Singer, *Privacy, Autonomy, and Dignity in Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons*, 21 BUFF. L. REV. 669 (1972).

and in 1844, the construction of the Clinton Prison was authorized.[44] No one questioned the shared basic premise of the Pennsylvania and Auburn systems: incarceration was the best societal response to criminal behavior.

While those guilty of lesser crimes served their time in local jails, the penitentiaries, from the beginning, housed the most violent criminals with the longest prison sentences. But prison wardens found it difficult to morally reform hardened inmates who would spend most of their lives behind prison walls. Confronted with the problem of coping with the unruly prisoner, most wardens reverted to the practice of whipping and chaining. The very punishments that penitentiaries were originated to eliminate were now widely used. An impenetrable wall of silence between the convict and warden emerged. Facing years of incarceration, the prisoners became uncooperative, forcing the wardens to increasingly devote their energy to maintaining peace and security within their institutions.[45]

The Pennsylvania scheme provided for a rigorous system of inspection of the penitentiary.[46] To the reformers, inspection was of utmost importance to discover and redress abuses.[47] The Auburn plan also agreed upon and provided for inspection.[48] But official inspection proved an uncertain check on the defects in the penitentiaries.[49] Legislative commissions and official visitors were unable to quell abuses.[50] A chairman of the Board of Inspections wrote that although he frequently visited Sing Sing, a New York prison, and gave its affairs close inspection, "[i]t was so easy for the officers to conceal even from me, with all my attention and vigilance, their abuses of authority and wanton cruelty."[51]

When the inmate population increased and became more violent, the wardens lost patience with reform. As they loosened their insistence on silence and separation, security became a problem. More energy was spent on administration of

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44. ATTICA, *supra* note 38, at 11.
45. ROTHMAN, *supra* note 2, at 249-51.
46. Leverson, *supra* note 16, at 416.
47. *Id.*
48. Other penitentiaries in Alabama, Delaware, Kentucky, Maryland, Massachusetts, New Jersey, Rhode Island, and Vermont also recognized the wisdom of official inspections. *See* Leverson, *supra* note 16, at 417-18.
49. *Id.* at 418.
50. *Id.* at 420.
51. *See* PHILIP KLEIN, PRISON METHODS IN NEW YORK STATE 361 (1969).

the penitentiary than on rehabilitation. There was also widespread prison mismanagement and cruelty. Within a few years, several wardens in Auburn were forced to resign because of their harsh treatment and neglect of their charges.[52] The debate no longer centered upon whether incarceration would reform the inmate, but rather on the extent of prison corruption.[53] There began a self-perpetuating period of decline with a diminishing attraction for both systems.

B. The Reformatory Movement—The Elmira Experiment

By 1860, the penitentiaries had lost their rehabilitative purpose; nevertheless they still continued to be the principal means of criminal punishment. Where influential reformists had once marveled at the massive penitentiaries, those who now took their first look at these institutions were clearly disappointed. Two leading American penologists, E.C. Wines and Theodore Dwight, prepared a widely read report asserting that the prisons no longer made rehabilitation the central goal.[54] They declared that "there is not a state prison in America in which the reformation of the convicts is the one supreme object of the discipline, to which everything else is made to bend."[55] These new reformists had little respect for the Pennsylvania and Auburn principles. As Wines and Dwight observed, conversations between inmates are beneficial since sociability is "a fountain of moral strength in civil life."[56] They also criticized the rigidity of prison routine, observing that "what we want is to gain the will, the consent, the cooperation of these men, not to mould them into so many pieces of machinery."[57]

The new reformists wanted the convicts, with appropriate supervision, to reenter society as quickly as possible. They promulgated the original idea of the indeterminate sentence which, according to Wines, "gave to the whole a wonderful vitality."[58] They promoted, at first, the commutation of sen-

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52. *See* W. DAVIS LEWIS, FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848, at 208-09 (1965); Leverson, *supra* note 16, at 426.

53. ROTHMAN, *supra* note 2, at 242.

54. ENOCH C. WINES & THEODORE W. DWIGHT, REPORT ON THE PRISONS AND REFORMATORIES OF THE UNITED STATES AND CANADA 287 (1867).

55. *Id.*

56. *Id.* at 179.

57. *Id.* at 181.

58. John P. Conrad, *Correctional Treatment*, *in* 1 ENCYCLOPEDIA OF CRIME AND

tence for good behavior, and then advocated probation and parole to further shorten the period of incarceration. Additionally, they urged the states to create agencies for the aftercare of released prisoners.[59] Moreover, they demanded a separate institution for young first offenders and another for more dangerous criminals. Segregating the minority that caused the most trouble, they believed, provided greater flexibility in prison administration.[60]

Although these new views added substantially to the disillusionment with the Auburn and Pennsylvania systems, Wines and Dwight never attracted a wide following. In 1877, however, they were able to initiate their progressive reforms at an institution in Elmira, New York, but only for the treatment of young first offenders.[61] Their theories were rarely introduced into the prisons which confined the older adult offenders and were therefore not applied to the mass of the country's prison population.[62]

The Elmira Reformatory, like its predecessors, became world famous. Penologists from many countries came to study its methods and operation. These visitors no longer saw inmates in striped uniforms, with shaven heads, moving in silent lockstep, as prevailed in other prisons at that time.[63] The Elmira regimen was an active one. There were hours of military drill and dress parades. Vocational training and educational programs, including moral and religious instruction, occupied the days of its inmates.[64]

The great advance of the reformatory system was that the term of incarceration now partially depended upon the prisoner's discernable progress toward reform. Its advocates stressed reformation rather than retribution. But the practice of good reformatory administration at that time required secure custody and permitted the superintendent wide discretionary

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JUSTICE 270 (Sanford H. Kadish ed., 1983).

59. ROTHMAN, *supra* note 2, at 252.

60. *Id.*

61. *See* BARNES, *supra* note 2, at 167-68.

62. *Id.* at 168. "States were slow to establish parole and probation systems, and even less inclined to construct separate institutions for different offenders." ROTHMAN, *supra* note 2, at 252. "Before the end of the century twelve states had built facilities on the Elmira model, and by 1933 there were eleven more." Conrad, *supra* note 58, at 270.

63. LEWIS E. LAWES, TWENTY THOUSAND YEARS IN SING SING 35 (1932).

64. *See generally* ZEBULON R. BROCKWAY, FIFTY YEARS OF PRISON SERVICE (1912).

powers, with no outside interference. The convict was to have no rights. His entire life was to be directed—all his waking hours, activities, and bodily and mental habits to be controlled.[65]

While Elmira had the important elements of reform, it failed to provide the right sort of psychological surroundings to implement its objectives. There was no grasp of the fundamental fact that a prisoner, to be prepared for a life of freedom, must be trained in some sort of social environment, which, as to his liberty and responsibility, has a fair resemblance to the society that he will reenter. There was no general recognition that the criminal must be dealt with as an individual, to assist him to lead a good and useful life on discharge. There was no encouragement to develop restraint born of character and responsibility. Basically, there was no attempt to develop in the prisoner a measure of self-development.

Far from a vast improvement, the Elmira system "was repressive and varied from benevolent despotism in the best instances, to tyrannical cruelty in the worst."[66] It was built on the same architectural principle as Auburn, but with "more drastic rules [for] punishment and obedience."[67] Though nominally a reformatory, in actuality it was a prison.[68] At Elmira, the ages of admission ranged from 16 to 30, which prompted an English authority to remark that the trouble with the Reformatory idea was "that it made youths out of adults and adults out of youths, subjecting both to all the odious and cruel oppressions that prevailed in prisons."[69]

Zebulon R. Brockway, a founder of the reformatory idea and the first superintendent of Elmira, ruled with an iron fist. He brought with him many of the features of adult prisons. Brockway's repressive administration led to many abuses, and when *The New York World* in 1900 published accounts of brutality within the Reformatory, he was forced to resign.[70]

Because of the above-mentioned failures, by the turn of the century, reformation no longer appeared to be the lodestar of incarceration. The new reformers were dissatisfied with peni-

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65. LAWES, *supra* note 63, at 37.
66. BARNES, *supra* note 2, at 168.
67. LAWES, *supra* note 63, at 37.
68. *Id.*
69. *Id.* at 36.
70. *Id.* at 38.

tentiaries but had attracted little support to narrow the gap between society and the imprisoned. The massive, fortress-like penitentiaries were, after all, still ready to receive the next generation of convicts. The custodial nature of the penitentiary, as its sole benefit, appeared satisfactory to prison officials, state legislators, and the ordinary citizen.[71]

C. "A Dark and Evil World"—The Arkansas Experience

The reformists' dream of an enlightened era in prison treatment had failed to flower. By the early 1900s, the concept of reformation had practically disappeared and, for the most part, the penitentiary served a purely custodial function as a warehouse for the convicted.[72]

Historically, the judiciary played no role in supervising the conditions in the prisons or any of the procedures employed in its administration. A prisoner was conceived as "the slave of the State,"[73] and the courts were reluctant to become immersed in prison operations. The universal wisdom was that the judiciary had no power to interfere with the jailer's discretion regarding the treatment and security of his charges.[74]

"Hands-off" was the clear order of the time. With virtual unanimity, the courts decided that they neither had the power, nor was it their function, to supervise prisons.[75] The "hands-off" doctrine was also supported by the legal theory distinguishing between rights and privileges.[76] Rights, of course, were basic and afforded the utmost protection requiring judicial scrutiny. The courts, however, confirmed the warden's discretion to label various features of prison existence as privileges, which were simply grants from him that could be restricted or withdrawn at will.[77] By marking all forms of prison life as privileges, the warden denied the prisoner a judicial forum.[78]

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71. ROTHMAN, *supra* note 2, at 255.

72. *Id.*

73. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

74. *See generally* Note, *supra* note 6.

75. *See, e.g.*, Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954).

76. *See generally* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

77. *See, e.g.*, Parks v. Ciccone, 281 F. Supp. 805 (W.D. Mo. 1968) (use of typewriter); Childs v. Pegelow 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964) (religious practices).

78. A few courts, however, departed from the "hands-off" doctrine and adopted a counterprinciple that "[a] prisoner retains all the rights of an ordinary citizen

However, in the late 1960s the "dark and evil world" of the penitentiary was finally exposed to a courageous federal district judge in Arkansas and subsequently to the nation.[79] The Arkansas prisoners initiated an unprecedented judicial attack on the State's archaic penitentiary system. What Chief Judge Henley learned about the Cummins Farm Unit and the Tucker Reformatory was "completely alien to the free world."[80] Inmates were tortured by electrical shocks and beaten with leather straps. Faced with the threat of death, they were forced to work ten hours a day, six days a week, sometimes in inclement weather and without adequate clothing. Trusty "inmate guards,"[81] with the power over life and death, supervised the daily routine of the prison.[82] Trying to escape forcible sexual violence and stabbings, the inmates in the barracks would "cling to the bars" all night.[83] A sentence in the Arkansas penitentiary amounted to "banishment from civilized society" to a damnable place.[84]

Faced with these degrading conditions, Chief Judge Henley turned to the "cruel and unusual punishment" clause of the Eighth Amendment and found a constitutional violation in the climate of fear and hatred produced through the brutal and capricious exercise of power by the trusties.

> It is one thing for the State to send a man to the Penitentiary as a punishment for crime. It is another thing for the State to delegate the governance of him to other convicts, and to do nothing meaningful for his safety, well being, and possible rehabilitation. . . .
>
> However constitutionally tolerable the Arkansas system

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except those expressly, or by necessary implication, taken from him by law." Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944); *see also* Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961); Fulwood v. Clemmer, 295 F.2d 171 (D.C. Cir. 1961).

79. Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). For a graphic visual depiction of the Arkansas Penal System, see the movie BRUBAKER (20th Century Fox 1980).

80. *Holt*, 309 F. Supp. at 381.

81. A trusty inmate guard is an inmate with administrative responsibilities. For a general discussion, see *id.* at 373-76.

82. "It is within the power of a trusty guard to murder another inmate with practical impunity, and the danger that such will be done is always clear and present." *Id.* at 374.

83. *Id.* at 377.

84. *Id.* at 381. Even today, remnants of the brutal power exercised by trusties and condoned by prison officials survive. *See* Aric Press, *Inside America's Toughest Prison*, NEWSWEEK, Oct. 6, 1986, at 46 (gripping story of the overcrowded conditions and brutal treatment of inmates in the Texas prison system).

> may have been in former years, it simply will not do today . . . .[85]

Prior to the prison litigation, the people of Arkansas "knew little or nothing about their penal system" despite "sporadic and sensational 'exposes.' "[86] The Arkansas experience became the new rallying point in prison reform. The myth that prisoners were treated humanely could no longer be maintained.

The Arkansas system proved to be neither an anachronism nor an aberration. Atrocities and mismanagement in other state prisons began to surface.[87] The lid was off. Our highest Court had not as yet directly faced the prison problems being played out in the lower courts,[88] but the time to do so was clearly at hand.[89]

III. THE SUPREME COURT LOOKS AT CORRECTIONAL FACILITIES—THE DEVELOPING THEORY

A. Wolff v. McDonnell—*Development of Procedural Due Process in Correctional Facilities*

Discipline was regarded as the key to success in the Auburn program. As the method to enforce discipline, the rule of

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85. Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

86. *Id.* at 367.

87. *See, e.g.*, Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974); Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), *motion to stay granted in part, denied in part*, 650 F.2d 555 (5th Cir. 1981), *aff'd in part, rev'd in part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio), *supplemented by* 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). See Rhodes v. Chapman, 452 U.S. 337, 353 n.1 (1981) (Brennan, J., concurring in the judgment), for a list of prison systems that had, by 1980, been declared unconstitutional under the Eighth and Fourteenth Amendments.

88. While prisoners' rights litigation began to flourish in the lower courts, for the most part the Supreme Court, which under Chief Justice Warren's leadership had greatly expanded the rights of those accused of crime, basically ignored the next step: guarding the constitutional rights of those confined in prison. However, as the Court became more familiar with prisoners' claims, it prohibited the states from hindering prisoner access to the courts and thereby chipped away at the "hands-off" doctrine. *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969). By the early 1970s, the Court had reviewed several prison regulations that focused on the scope of First and Fourteenth Amendment rights in prison. *See, e.g.*, Pell v. Procunier, 417 U.S. 817 (1974); Procunier v. Martinez, 416 U.S. 396 (1974); Cruz v. Beto, 405 U.S. 319 (1972).

89. See Hutto v. Finney, 437 U.S. 678 (1978), where the Court affirmed the findings and remedial orders of the district court and Eighth Circuit in the Arkansas prison decisions.

silence emerged as the most awesome feature of the penitentiary. After their tour through the Auburn prison, the French visitors Beaumont and Tocqueville wrote: "[W]e felt as if we traversed catacombs; there were a thousand living beings, and yet it was a desert solitude."[90]

The guards watching the movement of large numbers of inmates shuffling silently across the prison in lockstep could easily spot any unauthorized conversation or activity. For any infraction, the convict was swiftly punished. The whip was most common. Solitary confinement in a barren cell with one meal per day was soon introduced. Water "cures," stocks, and sweatboxes became widely used. These forms of punishment continued well into the middle 1900s.[91] The wisdom of the time was that discipline was strictly a matter for prison administrators.[92]

Against this backdrop, in *Wolff v. McDonnell*[93] the Court took its first crucial step into modern-day prison reform. *Wolff* involved a prisoner's interest in maintaining the "good-time credit" he had accrued. As it examined a prison disciplinary proceeding that took place in a "closed, tightly controlled environment,"[94] the Court sought to design a structure that would accord procedural due process to an inmate. The Supreme Court forcibly declared that "a prisoner is not wholly stripped of constitutional protections when he is imprisoned."[95] There was to be "no iron curtain drawn between the Constitution and the prisons of this country."[96] The *Wolff* majority wisely proclaimed that although confinement may diminish specific constitutional guarantees, including Fourteenth Amendment freedoms, "a mutual accommodation between institutional needs and objectives and the provisions of the Constitution" must be struck.[97]

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90. BEAUMONT & TOCQUEVILLE, *supra* note 37, at 65.

91. ATTICA, *supra* note 38, at 11. As the Arkansas experience demonstrated, brutality and torture by guards (and fellow prisoners) became commonplace in prison. See *supra* notes 79-89 and accompanying text for a discussion of the Arkansas experience.

92. The Warren Court did little in this area. Two notable exceptions were Johnson v. Avery, 393 U.S. 483 (1969) (permitting inmates to use "jailhouse lawyers" when the state failed to provide adequate legal assistance), and Mempa v. Rhay, 389 U.S. 128 (1967) (applying procedural due process requirements to the probation revocation process).

93. 418 U.S. 539 (1974).

94. *Id.* at 561.

95. *Id.* at 555.

96. *Id.* at 555-56.

97. *Id.* at 556.

Wolff rejected the State's assertion that a prisoner's interest "in disciplinary procedures is not included in that 'liberty' protected" by the Due Process Clause of the Fourteenth Amendment.[98] The State itself created the right to good-time credit toward early release from prison and recognized that its deprivation could only be sanctioned by major misconduct. The prisoner's interest, therefore, had real substance that sufficiently placed him within the pale of Fourteenth Amendment "liberty" and entitled him to minimum procedural due process.[99] The *Wolff* Court believed that a person's "liberty" is equally protected when it is a statutory creation of the State, and under these circumstances, "[t]he touchstone of due process is protection of the individual against arbitrary action of government."[100]

Prior to *Wolff*, state prison officials were able to take away good-time credits after "serious misconduct" was shown in a nonadversarial hearing.[101] *Wolff* determined that before state prisoners could lose good-time credits, minimum procedural safeguards required that they receive "advance written notice of the claimed violation and a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken."[102] Furthermore, prisoners were permitted, when not unduly hazardous to institutional safety or goals, to call witnesses and to present documentary evidence in their defense.[103]

The "mutual accommodation" model did not, however,

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98. *Id.* at 556-57. The Due Process Clause of the Fourteenth Amendment provides that a State cannot "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

99. 418 U.S. at 557.

100. *Id.* at 558.

101. *Id.* at 546, 548-53 n.8. The prisoners in *Wolff* argued for the same protections required in parole and probation revocation hearings included in Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973). In *Morrissey*, the Court required that procedural safeguards at parole revocation include written notice of the alleged violations, disclosure of damaging evidence, an opportunity to be heard and "to present witnesses and documentary evidence," "the right to confront and cross-examine adverse witnesses" (unless good cause for disallowing is shown), "a 'neutral and detached' hearing body," and "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *Morrissey*, 408 U.S. at 489. In *Gagnon*, the Court applied the *Morrissey* standards to probation revocation hearings, and further held that due process requires the appointment of counsel for the hearings when it is fundamentally necessary. *Gagnon*, 411 U.S. at 783-91.

102. *Wolff*, 418 U.S. at 563.

103. *Id.* at 566.

include the rights to confrontation, cross-examination, or the appointment of counsel. These procedural rights were thought to present serious hazards to institutional interests and were not perceived as requiring constitutional protection in the prison setting. The Court accepted the State's position that it would not be wise to encase disciplinary procedures in an "inflexible constitutional straitjacket" that requires adversary proceedings typical of a criminal trial.[104] Doing so would very likely raise the confrontational level between the staff and their charges and undermine the "utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution."[105] The Court noted that as penal institutions change and correctional goals are altered, the balance of interests may be reshaped.[106] For now, when security dangers are involved, the better practice, "in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons."[107]

Wolff revealed that, in striking a "mutual accommodation," deference to the sound discretion of state officials was to play the decisive role.[108] But by refusing to accept the established prison procedures, the Court discarded permanently the "hands-off" theory, inaugurating a new period in which the Court became a critical player.

Wolff, however, was criticized as a glancing blow to the prison-rights movement. Of course, many prisoners "have [very] little regard for the safety of others" or the regulations "designed to provide an orderly and reasonably safe prison [environment]."[109] But without the right to confront and cross-examine adverse witnesses, an inmate facing disciplinary proceedings was afforded little means to challenge the word of his accusers.[110] The deference accorded prison officials appeared to leave the inmate no remedy against a board intent on

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104. *Id.* at 563.
105. *Id.*
106. *Id.* at 568.
107. *Id.* at 569. Justice Marshall would have extended to prisoners those minimum requirements of due process required in parole revocation hearings as set out in Morrissey v. Brewer, 408 U.S. 471, 489 (1972). These would include the right to call witnesses and present documentary evidence, as well as the right to confront and cross-examine adverse witnesses. *Wolff*, 418 U.S. at 581-82 (Marshall, J., concurring in part and dissenting in part).
108. 418 U.S. at 569.
109. *Id.* at 562.
110. *Id.* at 582 (Marshall, J., concurring in part and dissenting in part).

restricting rights in the name of "institutional safety."[111] The right to call witnesses and present documentary evidence appeared unenforceable when left to the unchecked discretion of prison officials.

Wolff had not considered the best way to accommodate the inmate's right to call witnesses. If the disciplinary board was required to provide on the record (not necessarily available to the inmate) a contemporaneous written explanation for exclusion of an inmate's witness, it would have gone far toward assuring the board's decision was based on permissible factors. But when faced with this option in *Ponte v. Real*,[112] the Court once again opted for *Wolff*'s vaguely defined "correctional goal" of "swift discipline."[113] The Court held that prison officials must explain their reason at some time, but "they may do so either by making the explanation a part of the 'administrative record' in the disciplinary proceeding, or by presenting testimony in court."[114] By permitting a postponement of a reasonable explanation, *Real* left the inmates' constitutional rights to present evidence "dangling in the wind."[115]

Superintendent v. Hill[116] finally closed the door to disciplinary procedural due process by declaring that if there is any evidence in the record that supports the conclusion reached by the disciplinary board, then the tribunal's decision is constitutionally acceptable.[117] Meeting this standard does not require an examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence.[118]

Perhaps, viewed from the inmate's eye, the one-sidedness of the disciplinary hearings becomes clearer.

> [I]f I were to describe how they seem to a stranger, I would call them "pretend trials"—with the concept of "proving" guilt only make-believe. . . . [T]he process is not impartial, nor is guilt or innocence the issue. Guilt is an *a priori* assumption.[119]

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111. *Id.* at 593 (Douglas, J., dissenting in part, concurring in the result in part).
112. 471 U.S. 491 (1985).
113. *Id.* at 495.
114. *Id.* at 497.
115. *Id.* at 522 (Marshall, J., dissenting).
116. 472 U.S. 445 (1985).
117. *Id.* at 457.
118. *Id.* at 455.
119. KATHRYN W. BURKHART, WOMEN IN PRISON 147 (1973).

> As one administrator bluntly put it: . . .
>
> "A woman can speak on her own behalf and try to convince us she's telling the truth, but *we know what really happened.*"
>
> Inmates say the process is one-sided from the get-go. . . . The woman is not allowed to call witnesses in her behalf. And the board is not required to give a decision based on evidence.
>
> "It's your word against hers," said one woman who had been in solitary confinement for a week when I met her. "She's always going to win because they're her people, they're going to listen to her. You're just a number or a blank space in their minds. You go in and sit in front of that board and you know you don't have a chance in heaven to get out of going to solitary."[120]

Wolff's dissenters had not discounted the concerns prison officials had in maintaining prison security and understood that they were real and important; but they stressed that there was great danger in deferring to the "unreviewable discretion of prison authorities."[121] As Justice Douglas vigorously insisted, regarding due process issues, the Court "should no more place the inmate's constitutional rights in the hands of the prison administration's discretion than . . . place the defendant's right in the hands of the prosecutor."[122] But, *Wolff* and its progeny may have done just that.

B. From Meachum *to* Harper*—Liberty Interest Originating in the Fourteenth Amendment*

The liberty interest protected by *Wolff* had its origins in state law. A prisoner's interest in maintaining his good-time credits had real substance and was thus sufficiently embraced within Fourteenth Amendment liberty. *Wolff* recognized that under these circumstances, minimum procedures were required by the Due Process Clause "to insure that the state-created right [was] not arbitrarily abrogated."[123]

Wolff tied its entitlement analysis to the state-created provisions, but implied that this was not essential to its holding. Two years after *Wolff* was decided, the Court was asked to

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120. *Id.* at 147-48.

121. Wolff v. McDonnell, 418 U.S. 539, 601 (1974) (Douglas, J., dissenting in part, concurring in the result in part).

122. *Id.* at 600-01.

123. *Wolff*, 418 U.S. at 557.

determine whether its conception of liberty applied when the claimed right did not have its roots in state law. The key issue in *Meachum v. Fano*[124] was whether a state prisoner could be transferred to a prison that is substantially more restrictive, absent a fact-finding hearing of alleged misconduct.[125] At the outset, the Court rejected "the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause."[126] The prisoner's conviction had sufficiently extinguished his liberty to permit the State to confine him in any of its prisons.[127] The state law conferred no right on the prisoner to remain in the prison to which he was initially confined, and whatever expectation the prisoner may have had is "too ephemeral and insubstantial to trigger procedural due process protections."[128] In short, *Wolff*'s reasoning regarding hearings for good-time credit revocations and prison disciplinary confinement did not apply to prison transfers (even those sparked by alleged misconduct), and thus prison officials have unfettered discretion to transfer prisoners for any reason or for no reason at all.[129]

The net result of *Meachum* appeared to be that conviction and imprisonment extinguished a prisoner's liberty and that he could not gain any substantive protection from the bare wording of the Fourteenth Amendment Due Process Clause. A clear signal was sent to the states that enabled them to forestall the development of liberty interests, at least when no state law or specific constitutional provision provided otherwise. As long as

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124. 427 U.S. 215 (1976).

125. *Id.* at 216. The transfers occurred when, after a period of unrest at the Massachusetts Correctional Institution at Norfolk, several fires erupted that officials suspected the inmates had set. The corrections authorities, after reviewing the classification board's recommendations, transferred six inmates to the Walpole and Bridgewater facilities where living conditions were "substantially more adverse" than at Norfolk. Fano v. Meachum, 387 F. Supp. 664, 665-67 (D. Mass.), *aff'd*, 520 F.2d 374 (1st Cir. 1975), *rev'd*, 427 U.S. 215 (1976).

126. 427 U.S. at 224. See Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482 (1984), for a comprehensive study of the positivist theory of "property" and "liberty."

127. 427 U.S. at 224.

128. *Id.* at 228.

129. *Id.* The Court distinguished *Wolff* in that "[t]he liberty interest protected in *Wolff* had its roots in state law, and the minimum procedures required there were to protect a state-created right." *Id.* at 226. In *Meachum*, "[t]he predicate for invoking the protection of the Fourteenth Amendment as construed and applied in Wolff v. McDonnell is totally nonexistent." *Id.* at 227.

the conditions of confinement were within the sentence imposed and did not otherwise violate the Constitution, the Due Process Clause did not *alone* subject the prisoner's treatment by prison authorities to judicial oversight.[130] The Court refused to delineate a hierarchy of significant interests; rather its methodology was to closely examine the language of the relevant statutes and regulations to determine if there was a state-created substantive liberty interest.[131] The State could create enforceable liberty interests in the prison setting " 'by placing substantive limitations on official discretion.' "[132] Furthermore, "the use of 'explicit mandatory language' " that establishes "substantive predicates" to govern official decision making limits discretion and will force the Court to conclude that "the State ha[d] created a liberty interest."[133]

Justice Stevens, dissenting in *Meachum*, was disturbed by the majority's pinched constitutional conception of liberty. To him, it was self-evident that the correct source of liberty protected by the Constitution was the natural law, that all men are endowed by their creator with liberty as a cardinal, inalienable right. It is this basic freedom which due process protects, rather than "particular rights or privileges conferred by specific laws or regulations."[134] For Justice Stevens, it "demeans the concept of liberty itself—to ascribe to [it] nothing more than the protection of an interest that the State had created through its own [laws or] prison regulations."[135] To him, it was clear that "the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore."[136] Trying to identify the residuum of liberty that the prisoner retained in the prison environment was understandably a difficult task. Justice Stevens was convinced, however, that at a minimum, an inmate "has a protected right to pursue his limited rehabilitative

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130. Montanye v. Haymes, 427 U.S. 236, 242 (1976).

131. In Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 459-63 (1989), Justice Blackmun summarized the Court's history of liberties protected by due process. See *infra* text accompanying notes 263-68 for a discussion of *Thompson*.

132. *Id.* at 462 (quoting Olim v. Wakinekona, 461 U.S. 238, 249 (1983)).

133. *Id.* at 463 (quoting Hewitt v. Helms, 459 U.S. 460, 470-72 (1983) (holding that a regulation that employed unmistakably mandatory language, such as "shall," "will," or "must," creates a protected liberty interest)). See *infra* note 140 for a discussion of *Hewitt*.

134. Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting).

135. *Id.* at 233.

136. *Id.*

goals" and "to maintain whatever attributes of dignity" he can as an inmate in a "tightly controlled society."[137]

The debate on whether prisoners have liberty interests beyond those based on state law occupied the Court as it sought to develop the implications of *Meachum*.[138] At times, some members of the Court tried to blur the bright line of *Meachum*,[139] only to subsequently have the Court reaffirm *Meachum*'s theory.[140]

Finally, in *Vitek v. Jones*,[141] the Court gave the clearest evidence that it would find substantive due process rights in the prison context apart from state-created rights. In *Vitek*, the Court left no doubt that a state prisoner does possess a significant Fourteenth Amendment liberty interest in avoiding involuntary transfer to a mental hospital. The stigma attached to a transfer to a mental hospital for involuntary psychiatric treatment, coupled with subjecting the inmate to "mandatory behavior modification as a treatment for mental illness," required

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137. *Id.* at 234.

138. *See* Barry R. Bell, Note, *Prisoners' Rights, Institutional Needs, and the Burger Court*, 72 VA. L. REV. 161, 171-81 (1986).

139. *See, e.g.*, Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981). Justice White, the author of the majority opinions in *Wolff* and *Meachum*, insisted that "neither *Wolff* . . . nor *Meachum* . . . suggested that state law is the only source of a prisoner's liberty worthy of federal constitutional protection." *Id.* at 467-68 (White, J., concurring).

140. See, for example, Hewitt v. Helms, 459 U.S. 460 (1983), where the Court continued the highly restrictive *Meachum* theory.

The Court wrote that Helms "argues, rather weakly, that the Due Process Clause implicitly creates an interest in being confined to a general population cell, rather than the more austere and restrictive administrative segregation quarters." The Court concluded that "his argument seeks to draw from the Due Process Clause more than it can provide." *Id.* at 466-67.

Hewitt involved the extended use of administrative segregation without observance of the panoply of *Wolff*'s procedural requirements. Helms, a state prisoner was thought to have participated in a riot and was confined to an administrative segregation unit, pending investigation into his role. The Court determined that "administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration." *Id.* at 468. The Court characterized Helms's transfer as being merely "from one extremely restricted environment to an even more confined situation," *id.* at 473, concluding that in order to confine to administrative segregation a prisoner feared to be a threat to institutional security, the only process due was "an informal nonadversary review of evidence." *Id.* at 474.

The procedural safeguards of *Wolff* need not apply. Thus the Court permitted labels: disciplinary (*Wolff*) compared to classification (*Meachum*) and an administrative transfer (*Hewitt*) rather than substance and motivation to determine procedural rights.

141. 445 U.S. 480 (1980).

procedural safeguards even greater than those required by *Wolff*'s prison discipline analysis.[142] A decade later, relying on *Vitek*, in *Washington v. Harper*,[143] the Court again firmly acknowledged that a prisoner possesses a "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs."[144] But the Court's treatment of retained rights has proved ephemeral. *Vitek* and *Harper* are the rare exceptions,[145] as the states' stronger claims have almost invariably outweighed the claimed liberty interest.[146]

C. Specific Bill of Rights Provisions

1. Pretrial detainees—Bell v. Wolfish

In the restrictive atmosphere of prison, constitutional guarantees that may be taken for granted in free society assume far greater importance. The opportunities to pursue religious beliefs, to read a book, to write and receive a letter from a friend, or to have a family visit provide a vital link between the inmate and the outside world. These simple acts nourish the prisoner's mind, provide a respite from "the blankness and bleakness of his environment," and help to cultivate rehabilitation.[147]

Even before *Wolff*, the Court had recognized fundamental

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142. *Id.* at 494.

143. 494 U.S. 210 (1990).

144. *Id.* at 221-22. However, the Court held that, "given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmates' medical interest." *Id.* at 227. Furthermore, the Special Offender Center's policy was "neither arbitrary nor erroneous" and satisfied the procedural protections required by the Due Process Clause. *Id.* at 228. This was so, even though the decision to medicate an inmate against his will was made at a hearing by medical professionals rather than a judge. *Id.* at 228-35.

145. But see Turner v. Safley, 482 U.S. 78 (1987), where the Court recognized that the decision to marry is a constitutionally protected fundamental right even in the prison context. *Id.* at 96. Inmate marriages "are expressions of emotional support and public commitment," have spiritual significance, are an exercise of religious faith, and have an effect on the receipt of governmental benefits, property rights, and other less tangible benefits that are unaffected by the fact of confinement or legitimate corrections goals. *Id.* at 95-96. For a full discussion of *Turner*, see *infra* text accompanying notes 215-46.

146. Justice Rehnquist cogently summarized this view, noting that "our decisions have consistently refused to recognize more than the most basic liberty interests in prisoners." Hewitt v. Helms, 459 U.S. 460, 467 (1983).

147. *See* Wolfish v. Levi, 573 F.2d 118, 129 (2d Cir. 1978), *rev'd sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979).

rights protected by specific Bill of Rights provisions. The Court required limited desegregation of prison inmates,[148] guaranteed the right to a reasonable opportunity to pursue religious faith,[149] and limited the censorship of mail.[150] Most importantly, the states were required to provide meaningful access to the courts.[151]

Wolff inaugurated the period in which the Court was to take a more meaningful role in prison administration. *Wolff* itself dealt not merely with procedural due process in disciplinary hearings, but also with the claims that prison regulations infringed upon the prisoner's First and Sixth Amendment rights.[152] The Court decided that the possibility that contraband may be exchanged in letters, even from attorneys, warranted having prison officials inspect letters in an inmate's presence.[153]

As the Court took note of valid constitutional claims of prison inmates, it was also aware of the danger of meddling too extensively in the day-to-day administration of prisons. The problems of operating a correctional facility are enormous, and the Court believed it must give prison administrators wide-ranging deference in adapting and executing those policies needed to preserve internal order.[154] Therefore, even when an institutional restriction infringed a specific constitutional guar-

148. Lee v. Washington, 390 U.S. 333 (1968) (ordering prison desegregation, while acknowledging that security needs might limit the extent of the decree).

149. Cruz v. Beto, 405 U.S. 319, 322 (1972).

150. Procunier v. Martinez, 416 U.S. 396 (1974).

151. Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) (constitutionally mandated law libraries or alternative sources of legal knowledge); Johnson v. Avery, 393 U.S. 483 (1969) (inmates may assist other inmates in preparation of petitions if no other reasonable alternative provided); *Ex parte* Hull, 312 U.S. 546 (1941) (State may not abridge or impair a prisoner's right to apply to federal court for a writ of habeas corpus). The *Gilmore* theory was reaffirmed in Bounds v. Smith, 430 U.S. 817, 828 (1977), making it clear that the Constitution requires that prisoners have access to either "adequate law libraries" or to "adequate assistance from persons trained in the law" to aid them in pursuing claimed violations of fundamental constitutional rights in the courts.

152. Wolff v. McDonnell, 418 U.S. 539, 574-77 (1974).

153. *Id.* at 577. A lawyer desiring to correspond with a prisoner may also be required first to "identify himself and his client to the prison officials to assure that the letters marked privileged are actually from members of the bar." *Id.* at 576-77. The state conceded that it "cannot open and *read* mail from attorneys to inmates." *Id.* at 575.

154. *Id.* at 566.

antee, the practice must be appraised in connection with the main purpose of prison administration—preserving institutional safety.[155] In *Bell v. Wolfish*,[156] the Court concluded that pretrial detainees pose security risks similar to those of convicted inmates,[157] and, while prior decisions focused on convicted inmates, the "principle of deference" was not dependent on this fact.[158]

The specific conditions and restrictions challenged in *Wolfish* were "double bunking,"[159] the enforcement of a "publisher-only" rule (prohibiting receipt of hard-cover books that were not mailed directly from the publisher),[160] the prohibition against receipt of packages from outside the facility containing food or personal property,[161] the "unannounced searches of inmate living areas at irregular intervals" ("shakedowns"),[162] and finally, visual body cavity searches after contact visits with persons from outside the institution.[163]

The *Wolfish* Court analyzed the special status of pretrial detainees, identifying a special Fourteenth Amendment right "not [to] be punished prior to an adjudication of guilt in accordance with due process of law."[164] The Court noted that "not every disability imposed during pretrial detention amounts to punishment in the constitutional sense."[165] To ascertain whether it was punishment, the subjective intent of prison officials was decisive.[166] "Absent a showing of an expressed in-

155. *See* Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977).
156. 441 U.S. 520 (1979).
157. *Id.* at 546 n.28.
158. *Id.* at 547 n.29.
159. *Id.* at 530.
160. *Id.* at 548-49.
161. *Id.* at 553 (exception of one package of food at Christmas).
162. *Id.* at 555.
163. *Id.* at 558.
164. *Id.* at 535.
165. *Id.* at 537.
166. *Id.* at 537-38. The Court applied a punishment test established in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—(retribution and deterrence), whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in

tent to punish on the part of the detention facility," the determination of whether the particular restriction amounts to punishment turns on whether it is "reasonably related to a legitimate governmental objective" and not excessive in relation to that purpose.[167] The Court declared that the government may lawfully incarcerate a suspected criminal before trial, and any restraints that reasonably relate to jail security "do not, without more, constitute unconstitutional punishment, even if they are discomforting."[168]

Applying this analysis, the *Wolfish* Court determined that the double-bunking practice did not violate the inmate's due process rights.[169] "There was no 'one man, one cell' principle lurking in the Due Process Clause of the Fifth Amendment"[170] that would prohibit the placing of two detainees in an "admittedly rather small sleeping place" for a maximum period of sixty days.[171]

To define the rights of pretrial detainees, *Wolfish* relied on principles the Court had established over the past decade to determine the constitutional restrictions of convicted persons. Although detainees are entitled at least to those retained constitutional rights of convicted persons, all restrictions, even those that impinge upon a specific constitutional guarantee, "must be evaluated in the light of the central objective of prison administration, safeguarding institutional security."[172]

A detainee simply does not possess the full range of freedoms accorded to an unincarcerated individual. In balancing the competing interests, "[p]rison administrators therefore should be accorded wide-ranging deference" not only for their expertise in running a corrections institution, but also because

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differing directions.

Id. (footnotes omitted).

167. *Wolfish*, 441 U.S. at 538-39. "Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Id.* at 539.

168. *Id.* at 540.

169. *Id.* at 541.

170. *Id.* at 542. The federal government operated the detention facility in *Wolfish*: thus, the applicability of the Fifth Amendment Due Process Clause.

171. *Id.* at 543. The "detainees [were] required to spend only seven or eight hours each day in their rooms, during most or all of which they presumably [slept] . . . . During the remainder of the time, [they were] free to move between their rooms and the common area." *Id.* (footnote omitted).

172. *Id.* at 547.

the operation of detention facilities "is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."[173]

With this principle firmly established, the Court, on security grounds, upheld the regulations against all of the constitutional challenges. The "publisher-only" rule for hard-cover books did not violate the First Amendment since it reduced the chances that contraband would enter the prison. This "limited restriction [was] a rational response . . . to an obvious security problem."[174] Limitations on packages were held not to violate due process because of the administrative inconvenience of storing food and the serious security problems that arise from the introduction of such packages into the institution.[175] The "shakedown" searches in the absence of prisoners did not violate the Fourth Amendment and were permitted as facilitating "the safe and effective performance of the search."[176] Finally, the practice that instinctively gave the Court the most pause, the visual body cavity searches after contact visits,[177] was upheld as reasonable to deter the smuggling of weapons, drugs, and other contraband into the institution.[178]

2. *Eighth Amendment—Cruel and Unusual Punishment*—Rhodes v. Chapman

The *Wolfish* Court agreed that the Due Process Clause was the primary source of protection for pretrial detainees. "Due

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173. *Wolfish*, 441 U.S. at 547, 548.

174. *Id.* at 550.

175. *Id.* at 553-55.

176. *Id.* at 557. The Court assumed, *arguendo*, "that a pretrial detainee retain[ed] . . . a diminished expectation of privacy after commitment to a custodial facility." *Id.* Subsequently, in Hudson v. Palmer, 468 U.S. 517, 530 (1984), the Supreme Court held that "a prisoner has no expectation of privacy in his prison cell entitling him to the protection of the Fourth Amendment."

177. *See infra* notes 315-34 and accompanying text.

178. *Wolfish*, 441 U.S. at 558-59. Even though the district court noted that it would be virtually impossible for a prisoner wearing a jumpsuit zipped to the neck and under constant observation to hide items in a body cavity, United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 147 (S.D.N.Y. 1977), *aff'd in part, rev'd and remanded in part sub nom.* Wolfish v. Levi, 537 F.2d 118 (2d Cir. 1978), *rev'd sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979), the possibility that a prisoner might do so justified the practice. The Supreme Court observed that there had been only one instance where the inmate "was discovered attempting to smuggle contraband into the institution on his person," and credited this not to a lack of interest on the inmate's part to secrete such items but to the effectiveness of this practice as a search technique. 441 U.S. at 559.

process requires that a pretrial detainee not be punished."[179] Once convicted, however, the State acquires the power to punish "although the punishment may not be 'cruel and unusual' under the Eighth Amendment."[180]

The Cruel and Unusual Punishment Clause,[181] like all the other great clauses of the Constitution, is not subject to easy resolution. But, framed in this clause are the values basic to a "civilized society." It is, therefore, not surprising that the lower federal courts, in the 1970s, first turned to this passage in the Constitution when faced with the degrading conditions of confinement in the Arkansas prison system.[182] By 1981, federal courts in at least twenty-four states had declared the conditions in certain prisons and, in some cases the entire prison system, unconstitutional under the Eighth and Fourteenth Amendments.[183]

Rhodes v. Chapman[184] was the Supreme Court's first full-fledged consideration of Eighth Amendment claims by prison inmates.[185] The Southern Ohio Correctional Facility (SOCF), a maximum-security prison, was a modern institution and "unquestionably a top-flight, first-class facility."[186] "The food was 'adequate in every respect,' " "the noise in the cell-

179. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979).

180. *Id.*

181. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

182. The first prison litigation decision that enforced this provision was Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). In *Holt*, the district court found the Arkansas prison violated the Eighth Amendment rights of the prisoners confined there. See *supra* text accompanying notes 79-85 for a discussion of the *Holt* decisions.

183. Rhodes v. Chapman, 452 U.S. 337, 353 n.1 (1981) (Brennan, J., concurring in the judgment). "There [were] over 8,000 pending cases filed by inmates challenging prison conditions." *Id.* at 354 n.2.

184. 452 U.S. 337 (1981).

185. In Estelle v. Gamble, 429 U.S. 97 (1976), the Supreme Court had held that the government must provide medical care to those whom it punishes by imprisonment. "[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." *Id.* at 104 (citation omitted); *see also* Whitley v. Albers, 475 U.S. 312 (1986) (infliction of pain in the course of security measures to resolve disturbance is an Eighth Amendment violation only if inflicted unnecessarily and wantonly); *cf.* Hutto v. Finney, 437 U.S. 678 (1978) (ultimately affirming the findings and remedies of the Arkansas prison decisions, limiting the maximum period of punitive isolation to 30 days).

186. Chapman v. Rhodes, 434 F. Supp. 1007, 1009 (S.D. Ohio 1977), *aff'd*, 624 F.2d 1099 (6th Cir. 1980), *rev'd*, 452 U.S. 337 (1981).

blocks was not excessive," and the cells were free from odor with the temperature well controlled.[187] "In addition to 1,620 cells, it ha[d] gymnasiums, workshops, schoolrooms, 'dayrooms,' two chapels, a hospital ward, commissary, barbershop," outdoor recreation field, visitation area and garden, and a modern well-lit and superior library.[188] Its only failing was the practice of "double celling" prisoners because of overcrowding,[189] a practice the district court concluded was cruel and unusual punishment.[190]

Applying general principles that the Eighth Amendment " 'must draw its meaning from . . . evolving standards of decency,' "[191] the Court noted that prison conditions must neither inflict unnecessary and wanton pain "nor be grossly disproportionate to the severity of the crime warranting imprisonment."[192] But conditions that are not cruel and unusual under contemporary standards of decency are not unconstitutional. "To the extent that such conditions [may be] restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."[193] Double celling at SOCF "did not lead to deprivations of essential food, medical care, or sanitation. Nor did it increase violence among inmates . . . ."[194] Whatever discomfort it might have caused, it fell far short of violating the Constitution.[195]

The Court acknowledged that the judiciary had a "responsibility to scrutinize claims of cruel and unusual confinement."[196] But, in discharging their responsibility, the "courts

187. *Rhodes*, 452 U.S. at 342 (quoting *Rhodes*, 434 F. Supp. at 1019).
188. *Id.* at 340-41.
189. *Id.* at 343-44. Of prime concern to the district court was that the double celling was not a temporary condition, and that it was forced upon inmates serving long prison terms, who spent most of their time in the cell. *Id.*
190. *Id.* at 343. The district court determined that each inmate should have at least 50-55 square feet of space, but the double-celled inmates shared only 63 square feet. The district court asserted double celling was a permanent practice at SOCF and that prisoners who were double celled spent most of their time in the cell with their cellmates. The district court concluded that double celling at SOCF was cruel and unusual punishment. *Id.* at 343-44. Only Justice Marshall agreed that confinement to this limited cell space qualified as "cruel and unusual punishment." *Id.* at 375 (Marshall, J., dissenting).
191. 452 U.S. at 346 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).
192. *Id.* at 346-47.
193. *Id.* at 347.
194. *Id.* at 348.
195. *Id.* at 347-48.
196. *Id.* at 352.

cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution."[197] The *Rhodes* Court could not mask its disappointment in the lower courts, admonishing them to "bear in mind that their inquiries 'spring from constitutional requirements and that judicial answers to them must reflect that fact rather than [their] idea of how best to operate a detention facility.' "[198] The Court strongly cautioned lower federal court judges not to use the Eighth Amendment as a vehicle for prison reform. To insure compliance, the Court demanded deference to state legislatures and prison officials.[199]

In *Wilson v. Seiter*,[200] the Court added to its Eighth Amendment analysis an additional element: an intent requirement. The *Wilson* Court noted that *Rhodes* focused on the objective component of an Eighth Amendment prison claim (that double celling was not sufficiently inhumane) and did not need to consider the "subjective component (did the officials act with a sufficiently culpable state of mind?)."[201] Since the infliction of punishment is a deliberate act intended to chastise or deter, Justice Scalia, for the *Wilson* majority, held that prisoners challenging the conditions of their confinement[202] under the

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197. *Id.* Writing separately, Justice Blackmun perceived that some of *Rhodes*'s language may be

> a signal to prison administrators that the federal courts now are to adopt a policy of general deference to such administrators and to state legislatures, deference not only for the purpose of determining contemporary standards of decency, but for the purpose of determining whether conditions at a particular prison are cruel and unusual within the meaning of the Eighth Amendment.

Id. at 369 (Blackmun, J., concurring in the judgment) (citation omitted). Noting that such deference was the old attitude held several decades ago, he agreed with Justice Brennan "that the federal courts must continue to be available to those state inmates who sincerely claim that the conditions to which they are subjected are violative of the Amendment." *Id.*

198. 452 U.S. at 351 (quoting Bell v. Wolfish, 441 U.S. 520, 539 (1979)).

199. *Id.* at 352.

200. 111 S. Ct. 2321 (1991).

201. *Id.* at 2324.

202. In *Wilson*, an Ohio prison inmate challenged a number of conditions of his confinement, including "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, . . . unsanitary dining facilities and food preparation," and the housing of well inmates with mentally and physically ill inmates. *Id.* at 2323.

The *Rhodes* Court had observed that conditions of confinement, "alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Justice Brennan had viewed the Court as having adopted a "totality of the circumstances test." *Id.* at 363 n.10

Eighth Amendment must show "deliberate indifference" by the responsible official.[203] For Justice Scalia, this mandated an inquiry into the prison officials' state of mind.

Wilson's intent requirement was not only a departure from *Rhodes*, but it may also prove difficult to apply.[204] The judicial opinions detailing prison conditions do not make for pleasant reading.[205] For example, the Alabama system was described by a U.S. health official as "wholly unfit for human habitation according to virtually every criterion used for evaluation by public health inspectors."[206] The institutions were "horrendously overcrowded" and infested with roaches, flies, and other vermin. The food was "unappetizing and unwholesome," poorly prepared, and "infested with insects." There was "rampant violence," where the weaker inmates were repeatedly victimized by the stronger inmates, and where "robbery, rape, extortion, theft and assault [were] everyday occurrences" among the general population.[207] The Alabama experience was not an aberration, as similar tales of horror were recounted concerning other institutions.[208]

(Brennan, J., concurring in the judgment).

Justice Scalia explained that, in his view, *Rhodes* did not mean to establish such a broad proposition. For him, "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Wilson*, 111 S. Ct. at 2327. He viewed *Rhodes*'s combination language to require the conditions to have a "mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets." *Id.*

203. *Wilson*, 111 S. Ct. at 2326-27.

204. *Id.* at 2328-31 (White, J., concurring in the judgment).

205. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 354-56 (1981) (Brennan, J., concurring in the judgment) (describing the gruesome conditions in the Alabama penal system); *supra* text accompanying notes 79-85 (describing the Arkansas correctional system).

206. Pugh v. Locke, 406 F. Supp. 318, 323-24 (M.D. Ala. 1976), *aff'd as modified sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (per curiam), *and cert. denied sub nom.* Newman v. Alabama, 438 U.S. 915 (1978).

207. *Pugh*, 406 F. Supp. at 322-25.

208. *See* Rhodes v. Chapman, 452 U.S. 337, 353 n.1 (1981) (Brennan, J., concurring in the judgment); *see also* Ruiz v. Estelle, 503 F. Supp. 1265, 1391 (S.D. Tex. 1980).

> [I]t is impossible for a written opinion to convey the pernicious conditions and the pain and degradation which ordinary inmates suffer within [unconstitutionally operated prisons]—the gruesome experiences of youthful first offenders forcibly raped; the cruel and justifiable fears of inmates, wondering when they will be called upon to defend the next violent assault; the sheer misery, the discomfort, the wholesale loss of privacy for

To permit prison officials to "interpose [as their] defense that they made good faith efforts to obtain funding," but that "fiscal constraints beyond their control prevented the elimination of inhumane conditions,"[209] would be to ignore serious deprivations of basic human needs.[210] These conditions are the consequence of the cumulative actions by state legislative bodies and prison administrations over a long period of time.[211] A reasonably safe and sanitary environment, free from conditions which inexorably and unnecessarily cause physical and mental deterioration, should be the Court's goal. Confinement with dignity should be society's hallmark.

IV. THE NEWLY MINTED STANDARD

A. Turner v. Safley—*A Crushing Blow To Prisoners' Rights*

By the mid-1980s, the Supreme Court was firmly enmeshed in prison litigation. *Wolff*[212] and *Wolfish*[213] played a critical role in shaping the Court's theories. *Wolff* catered to deference but still counseled a reasonable accommodation. *Wolfish* turned to the historical role of the judiciary in penal reform and mandated a position of even greater deference to the judgment of prison administrators.[214]

> prisoners housed with one, two, or three others in a forty-five foot cell or suffocatingly packed together in a crowded dormitory; the physical suffering and wretched psychological stress which must be endured by those sick or injured who cannot obtain adequate medical care . . . .
>
> For those who are incarcerated within [such prisons], these conditions and experiences form the content and essence of daily existence.

Rhodes, 452 U.S. at 353 n.1 (Brennan, J., concurring in the judgment).

209. Wilson v. Seiter, 111 S. Ct. 2321, 2326 (1991). Justice Scalia would apparently accept this defense. He noted that even if this were so, "it is hard to understand how it could control the meaning of 'cruel and unusual punishment' in the Eighth Amendment. An intent requirement is either implicit in the word 'punishment' or it is not; it cannot be alternately required and ignored as policy considerations might dictate." *Id.*

210. A rare alliance was forged in *Wilson* when the Justice Department joined the American Civil Liberties Union in urging rejection of intent. As argued by the United States: "[S]eriously inhumane, pervasive conditions should not be insulated from constitutional challenge because the officials managing the institution have exhibited a conscientious concern for ameliorating its problems, and have made efforts (albeit unsuccessful) to that end." *Id.* at 2331 (White, J., concurring in the judgment) (citing brief for the United States as *amicus curie* at 19).

211. *Id.* at 2330.

212. Wolff v. McDonnell, 418 U.S. 539 (1974).

213. Bell v. Wolfish, 441 U.S. 520 (1979).

214. *Wolfish*, 441 U.S. at 540-41 n.23 (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)). The Court repeated this admonition a second time. *Id.* at 547 n.29.

As the Court began to translate the proper posture of deference into meaningful practices, there was still much disagreement as to the appropriate standard to apply when prison regulations impinged on fundamental constitutional rights. In *Turner v. Safley*,[215] the Court provided the solid guidance needed for determining whether regulations promulgated by prison administrators run afoul of constitutional rights retained by prisoners.

The inmates in *Turner* challenged two prison regulations. The first regulation permitted correspondence between "immediate family members who [were] inmates in other correctional institutions," and between inmates "concerning legal matters," but did not allow other inmate-to-inmate correspondence unless the "treatment team" of each inmate approved.[216] In practice, the effect of this regulation completely prohibited correspondence between unrelated inmates.[217] The second regulation permitted prisoners to marry other inmates or civilians only with the permission of the prison superintendent.[218] Permission was to be given only where there were "compelling reasons" for the marriage—interpreted by prison officials as "pregnancy or the birth of an illegitimate child."[219]

The Court acknowledged that its task was "to formulate a standard of review for prisoners' constitutional claims that [was] responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.' "[220] The court of appeals had affirmed the district court's application of a "strict scrutiny standard,"[221] reasoning that this standard was appropriate since both regulations prohibited the exercise of fundamental rights.[222] But Justice O'Connor (writing for the majority) disagreed, and, after reviewing some of the Court's more recent prisoners' rights decisions, found in those decisions the makings of a general standard. In none of these cases had the Court applied

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215. 482 U.S. 78 (1987).
216. *Id.* at 81-82.
217. *Id.* at 82. "[T]he determination whether to permit inmates to correspond was based on team members' familiarity with the progress reports, conduct violations, and psychological reports in the inmates' files rather than on individual review of each piece of mail." *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 85 (quoting Procunier v. Martinez, 416 U.S. 396, 406 (1974)).
221. *Id.* at 83.
222. *Id.* at 87.

a standard of "heightened scrutiny." Rather, the Court had inquired "whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns."[223]

Applying an inflexible strict scrutiny analysis to the day-to-day judgments of prison officials, O'Connor reasoned, "would seriously hamper their ability to anticipate security problems and to adopt innovative solutions" to difficult administrative problems. Furthermore, a strict scrutiny rule would "distort the decisionmaking process," inevitably making the courts the final arbiter of "what constitutes the best solution,"[224] thereby " 'unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.' "[225]

Justice O'Connor outlined four factors relevant to her "reasonableness" analysis. First is a " 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[226] The goal must be a legitimately neutral one and the logical connection between it and the regulation not so remote as to render it "arbitrary or irrational."[227]

The second consideration is the availability of other means by which the prisoner could exercise the right.[228] Where "other avenues" remain available, she cautioned that "the courts should be particularly conscious of the 'measure of judicial deference' " to be accorded to the professional judgment of prison officials.[229]

The third consideration is the impact that granting a certain right will have on the guards and other inmates.[230] Recognizing that "few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order,"[231] deference to the "informed discretion of corrections officials" is necessary, especial-

223. 482 U.S. at 87.
224. *Id.* at 89.
225. *Id.* (quoting Procunier v. Martinez, 416 U.S. 396, 407 (1974)).
226. *Id.* (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).
227. *Id.* at 89-90.
228. *Id.* at 90.
229. *Id.* (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).
230. *Id.*
231. *Id.*

ly when accommodating the asserted right "will have a significant 'ripple effect' on fellow inmates or on prison staff."[232]

Finally, if the prisoner has "an alternative that fully accommodates [his] rights, at *de minimis* cost to valid penological interests," such an alternative is evidence a court may consider in determining whether "the regulation does not satisfy the reasonable relationship standard."[233] Justice O'Connor warned that this last factor "is not a 'least restrictive alternative' test" but, "[b]y the same token, the existence of obvious, easy alternatives [is] evidence that the regulation" may be unreasonable and "an 'exaggerated response' to prison concerns."[234]

Addressing the new standard, Justice O'Connor credited the prison officials' testimony that "mail between institutions can be used to communicate escape plans and to arrange assaults and other violent acts" and to facilitate prison gang activities.[235] Applying her analysis to the record "clearly demonstrat[ed] that the regulation was reasonably related to legitimate security interests."[236] Moreover, the regulation did not "deprive prisoners of all means of expression," but merely barred communication with a limited class of persons (inmates of other state institutions) "with whom prison officials have particular cause to be concerned."[237]

The potential "ripple effect" on other inmates and prison personnel is great. Accepting the prison officials' professional judgment that "correspondence between [prisons] facilitates the development of informal organizations that threaten . . . safety and internal security,"[238] Justice O'Connor believed that the asserted correspondence right could "be exercised only at the cost of significantly less liberty and safety for everyone else."[239]

Justice O'Connor determined that there were no "obvious, easy alternatives" to the existing regulations, rejecting as inadequate and overly burdensome the prisoners' sole proposal of

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232. 482 U.S. at 90.
233. *Id.* at 91.
234. *Id.* at 90.
235. *Id.* at 91.
236. *Id.*
237. *Id.* at 92.
238. *Id.*
239. *Id.*

monitoring the correspondence.[240] She agreed with the prison officials that it would be impossible for the mailroom "to read every piece of inmate-to-inmate correspondence," and consequently, there was an "appreciable risk of missing dangerous messages." "In any event, prisoners could easily write in jargon or codes to prevent detection of their real messages."[241]

Justice O'Connor concluded that the "prohibition on correspondence [was] reasonably related to valid corrections goals" (institutional security), was not an exaggerated response to this concern, and therefore did not unconstitutionally abridge the prisoner's First Amendment rights.[242]

The rule allowing inmate marriages only with permission of the prison superintendent did not, however, pass the reasonable relationship standard. Recognizing the decision to marry as a fundamental right, Justice O'Connor characterized the regulation as an "exaggerated response" to the security and rehabilitative objectives of the State.[243] She noted that there were "obvious, easy alternatives" readily available to prison officials to accommodate the right to marry that imposed a minimal burden on security.[244]

The "newly minted"[245] standard announced in *Turner*, of course, was hardly new, since O'Connor drew upon previous decisions in identifying the several factors relevant to a reasonableness determination.[246] Justice O'Connor had merely

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240. 482 U.S. at 93.

241. *Id.*

242. *Id.*

243. *Id.* at 97-98. The security justification advanced by prison officials concerned the possibilities of violent "love triangles" leading to confrontation between inmates. *Id.* at 97. Justice O'Connor summarily rejected this, reasoning that such inmate rivalries were just as likely to occur without a formal marriage ceremony. *Id.* at 98.

Secondly, the prison administration asserted a rehabilitative theory, encouraging self-reliance among female inmates abused at home or who exhibited a detrimental overdependence on males. *Id.* at 97. Superintendent Turner testified that "in his view, these women [inmates] needed to concentrate on developing skills of self-reliance," and "that the prohibition on marriage furthered this rehabilitative goal." *Id.* Justice O'Connor found the asserted rehabilitative objective "suspect," as only one marriage request was refused on the basis of fostering excessive dependency; and excessively paternalistic, as all female requests were scrutinized carefully while males were routinely approved. *Id.* at 99. Furthermore, the "rehabilitation concern [in the record] centered almost exclusively on female inmates marrying other inmates or ex-felons," and this "does not account for the ban on inmate-civilian marriages." *Id.*

244. *Id.* at 98.

245. *Id.* at 101 (Stevens, J., concurring in part and dissenting in part).

246. The elements of reasonableness in *Turner* are similar to those factors that

supplemented her "reasonable relationship" analysis by expanding upon additional factors that should be considered in evaluating the challenged prison regulation. The decision's basic framework contained many of the same considerations that had constituted the unique components of the Court's prior analysis.

More importantly, the Court once again emphasized "deference" over "rights." The Court's challenge was how to best protect those precious few prisoners' rights that remained while accommodating institutional needs. *Turner* refused to break the pattern: "categorical deference" was once again the order of the day.

B. Turner*'s Progeny—The Knockout Punch*

Turner framed the standard of review, delineating the boundaries within which the debate over prisoners' rights must take place. The Court's values and motives were clearly enunciated, its language a clear signal to prison administrators that categorical deference to their judgment was to continue as a policy of the Rehnquist Court.[247] Rapidly, the Court dismantled other potential "prisoners' rights."

One week after deciding *Turner*, the Court applied its standard to policies adopted by state correctional officials that effectively prevented Muslim inmates, who were assigned to outside work crews, from attending Jumu'ah, the central weekly religious service of their faith. In *O'Lone v. Estate of Shabazz*,[248] Muslim inmates challenged prison policies aimed at relieving service overcrowding, but which had the incidental effect of preventing them from attending Jumu'ah. Significant security problems arose with Muslims assigned to outside work details. As their return posed unacceptable security risks and administrative burdens, a new policy memorandum "prohibited in-

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the Court had developed in prior decisions. Justice O'Connor specifically cited prior prisoners' rights cases as the origins of the factors she developed in her analyses. *Turner*, 482 U.S. at 89-90 (citing Block v. Rutherford, 468 U.S. 576 (1984); Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974)). Justice O'Connor stated that *Pell*, *Jones*, and *Bell* had probably already determined the proper standard for review. *Id.* at 89. But if not, she resolved it: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.*

247. *See Turner*, 482 U.S. at 85.

248. 482 U.S. 342 (1987).

mates . . . from returning to the prison during the day except in the case of emergency."[249]

The Supreme Court, in an opinion by Chief Justice Rehnquist, determined that the court of appeals was clearly wrong when it required the state to show that it had made a bona fide inquiry into whether reasonable methods existed by which the prisoners' religious rights could be accommodated without creating security problems.[250] The court of appeals believed that

> [w]here it is found that reasonable methods of accommodation can be adopted without sacrificing either the state's interest in security or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice cannot be justified and violates the prisoners' First Amendment rights.[251]

But the Chief Justice firmly declared that this articulated approach had failed "to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators."[252] Although mutual accommodation is relevant to the reasonableness inquiry, Chief Justice Rehnquist reasoned that prison administrators do not " 'have to set up and then shoot down every conceivable method of accommodating the [prisoners'] constitutional' " rights.[253]

Applying the new *Turner* standards, Chief Justice Rehnquist found beyond doubt that the new policy was related to legitimate security concerns.[254] Furthermore, the Muslim inmates' ability "to participate in other religious observances of their faith" gave added credence to the determination that the restrictions were reasonable.[255] Finally, the inmates' suggested accommodations[256] would "threaten prison security by allowing 'affinity groups' in the prison to flourish" and create a perception of favoritism toward the Muslims.[257] The Chief

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249. *Id.* at 347.
250. *Id.* at 350.
251. Shabazz v. O'Lone, 782 F.2d 416, 420 (3d Cir.), *stay denied sub nom.* O'Lone v. Estate of Shabazz, 478 U.S. 1033 (1986), *and rev'd*, 482 U.S. 342 (1987).
252. *O'Lone*, 482 U.S. at 350.
253. *Id.* (quoting Turner v. Safley, 482 U.S. 78, 90-91 (1987)).
254. *Id.* at 351.
255. *Id.* at 352.
256. The inmates suggested "placing all Muslim inmates in one or two inside work details or providing weekend labor for Muslim inmates." *Id.*
257. *Id.* at 353.

Justice concluded by reaffirming the Court's refusal, "even where claims are made under the First Amendment" Free Exercise Clause, "to 'substitute [its] judgment on . . . difficult and sensitive matters of institutional administration' " for the prison administrators' determination.[258]

Deference had assumed a new constitutional prominence in prison decisions. Incoming publications would now be constitutionally rejected if prison officials found their contents were " 'detrimental to . . . security, good order, or discipline' " or " 'might facilitate criminal activity.' "[259] This time, despite the apparent vagueness of the terms used in the regulations, Justice Blackmun, writing for the majority in *Thornburgh v. Abbott*,[260] declared the terms facially valid in order to give prison authorities broad discretion.[261] The warden had once again achieved free reign to censor what the prisoners read.[262]

In *Kentucky Department of Corrections v. Thompson*,[263] Justice Blackmun, once again writing for the majority, gave correctional officials unbridled authority over the "basic human need" of the prisoner to see family and friends.[264] In *Thompson*, Justice Blackmun questioned whether it could "seriously be contended . . . that an inmate's interest in unfettered visitation is guaranteed directly by the Due Process Clause."[265] Finding that the "denial of prison access to a particular visitor" was " 'within the terms of confinement ordinarily contemplated by a prison sentence,' " the Court determined that access was

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258. *Id.* (quoting Block v. Rutherford, 468 U.S. 576, 588 (1984)).

259. Thornburgh v. Abbott, 490 U.S. 401, 404 (1989) (quoting 28 C.F.R. § 540.71(b) (1988)).

260. 490 U.S. 401 (1989).

261. *Id.* at 419. The regulations authorize rejection of the entire publication, even if just one page presents an intolerable security risk. *Id.* at 431 (Stevens, J., concurring in part and dissenting in part). The primary justification advanced for the rule was administrative convenience. A contrary rule would require "laboriously going over each article in each publication" and defacing the material. *Id.* at 432-33.

Justice Stevens criticized the "meat-ax" abridgment of the First Amendment rights on the general speculation that some administrative burden might ensue. *Id.* Moreover, he found it difficult to imagine such a burden "if, as the regulations' text seems to require, prison officials actually read an article before rejecting it, the incremental burden associated with clipping out the offending matter could not be of constitutional significance." *Id.*

262. 490 U.S. at 428 (Stevens, J., concurring in part and dissenting in part).

263. 490 U.S. 454 (1989).

264. *Id.* at 465-66 (Marshall, J., dissenting).

265. *Thompson*, 490 U.S. at 460.

not independently protected by the Due Process Clause.[266] Furthermore, the state regulations lacked the requisite "mandatory language" to establish a "liberty interest" entitled to the protections of the Due Process Clause.[267] After *Thompson*, the warden was free to deny prisoners visits from family members or friends without stating a reason; hence, there were practically no constraints.[268]

Turner, *O'Lone*, *Abbott*, and *Thompson* clearly demonstrated how feeble any protection would be under *Wolff*'s call for a "reasonable accommodation." In less than two years, the Court had, under the warden's waving of the security flag, severely limited the inmates' First Amendment rights and placed within the warden's unchecked discretion the most "basic human need" of an inmate to see his family. The warden, with the Court's blessing, was now firmly the master at the helm. Deference had become the substitute shibboleth for "hands-off." The chance of reaching any meaningful "mutual accommodation" appeared slim.

V. A CRITICISM OF THE DEFERENCE MODEL

Prisoners are politically powerless to change their conditions. They are voteless and socially threatening. As crime rates have increased, public apathy has contributed to the negative attitude of politicians and prison officials toward any substantial reform. It is generally accepted that prisoners, isolated from public view and regarded with disgust by the politic, are receiving their "just deserts." Against this background, the lower federal courts emerged as the critical force able to ameliorate inhumane conditions during the 1970s and 1980s.[269]

But deference has assumed the prominent position in prison litigation. The likelihood of achieving any meaningful "mutual accommodation" is minimal as long as the Supreme Court continues to categorically yield to the prison authority's own assessment of its security needs. By readjusting the scales in

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266. *Id.* at 461 (quoting Hewitt v. Helms, 459 U.S. 460, 468 (1983)).

267. *Id.* at 464-65.

268. But compare Justice Kennedy's concurrence: "Nothing in the Court's opinion forecloses the claim that a prison regulation permanently forbidding all visits to some or all prisoners implicates the protections of the Due Process Clause in a way that the precise and individualized restrictions at issue here do not." *Id.* at 465 (Kennedy, J., concurring).

269. Rhodes v. Chapman, 452 U.S. 337, 359 (1981) (Brennan, J., concurring in the judgment).

the deference direction, respect for any residual rights that may have been retained by prisoners has been restricted or simply eliminated. The Court's continual capricious invocation of the deference model runs the risk of returning prisons to the past when prevailing conditions of "barbarism and squalor . . . were met with a judicial blind eye and a 'hands off' approach."[270]

A. Judicial Restraint—Administrative Expertise

Prison litigation marks an important accommodation between courts and other branches of government, in particular between the federal courts and state institutions. It is exemplary not merely because of its complexity, but because of the degree of judicial intrusion. To some commentators, the prison cases evidence "judicial activism."[271] This label may suggest that courts are acting in a field more properly within the executive and legislative spheres of influence. Intimately connected to this theme is the idea that the courts must be wary of violating traditional separation of powers principles. A fundamental precept of this commentary is that when the court orders an institutional remedy, even if it does not cross a well-defined legal line, it steps too close to the boundaries of other branches of government.

A closely connected motif concerns the courts performing administrative and supervisory tasks with which they have little familiarity and too few qualifications. Without statutory authority, these burdens are seen as the sole responsibility of prison authorities.

And, of course, there should be sensitivity to federalism concerns whenever a federal court makes intrusive orders regulating state institutions. Overriding the entire debate is the question of judicial authority to allocate public funds to effect its orders.[272] The necessary funds, if available at all, are gen-

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270. Block v. Rutherford, 468 U.S. 576, 594 (1984) (Blackmun, J., concurring in the judgment).

271. For a general discussion on judicial activism, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Archibald Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791 (1976); Robert D. Goldstein, *A* Swann *Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1 (1978).

272. Federal Judge Anthony A. Alaimo ordered the Georgia Corrections Department to spend $60.2 million "to improve, modernize and expand" the Georgia State Prison in Reidsville and to "replace its dangerous overcrowded open dormitories

erally thought to be weighed and allocated by the legislative and executive branches of government.

When the Supreme Court counsels judicial restraint, it has in mind the panoply of these commentaries. But these observations deserve far more discussion because they represent fundamental choices respecting constitutional rights and remedies, preferences that should not be made by sparring over the appropriate role of federal courts.[273]

Probably the most misplaced practice is that of according judicial deference to administrative expertise. The care and custody of prisoners are relegated to correctional agencies which are chronically understaffed and ill-trained.[274] Prison administrators relinquish supervisory control to guards who deal with inmates intimately on a daily basis. As a result, subordinate custodial personnel, often undereducated and undertrained, exercise independent and sometimes capricious discretion in meting out severe disciplinary sanctions. As noted by two commentators active in prison litigation:

> Prisoners often have their privileges revoked, are denied the right of access to counsel, sit in solitary or maximum security or lose accrued "good time" on the basis of a single, unreviewed report of a guard. When the courts defer to administrative discretion, it is this guard to whom they delegate the final word on reasonable prison practices. This is the central evil in prison. It is not homosexuality, nor inadequate salaries, nor the cruelty and physical brutality of some of the guards. The central evil is the unreviewed administrative discretion granted to the poorly trained personnel who deal directly with prisoners.[275]

Of course, the evaluation of penological objectives has, in the first instance, been trusted to the wise judgment of prison

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with single cells." Jingle Davis, *Judge Pays Surprise Visit to Prison, and Is Pleased*, ATLANTA J. & CONST., June 19, 1990, at D1, D6.

273. Problems of judicial intrusion into the operations of large public institutions are shared by other forms of institutional litigation, especially school desegregation and mental health. *See* Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

274. TASK FORCE ON CORRECTIONS, PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 93-99 (1967).

275. Philip J. Hirschkop & Michael A. Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 811-12 (1969). See *supra* text accompanying note 120 for a prisoner's account that exemplifies the capricious nature of disciplinary hearings.

administrators "who are actually charged with and trained in the running of the particular institution under examination."[276] But the judiciary functions as the final arbiter. When it fails to review and correct prison conditions, it legitimizes the status quo and encourages abuse.[277]

B. Judicial Restraint—Separation of Powers and Federalism

The Court has felt it important to respect the judgment of prison officials. The Court is not only influenced by prison officials' expertise, but also by the fear that serious separation of powers issues would arise if the judiciary attempted to run the prisons.[278] Are courts displacing executive and legislative power in a way that violates separation of powers? Prison litigation arises not so much because of a conflict of power, but because the courts are asked to fill a vacuum created by the other branches of government. Judicial authority in prison litigation may be attributed to legislative inaction and executive neglect. Only after it became clear that no relief would be voluntarily forthcoming were the courts dragged into prison reform.[279]

The story of *Holt v. Sarver*,[280] the federal courts' first serious foray into state prisons, is representative of federal reluctance to intrude upon the states' legislative and executive prerogatives. Although the court found that the conditions at the Arkansas prison were degrading, disgusting, and inhumane, for many months the federal court left the remedies to state authorities. Only after it was apparent that Arkansas was not about to clean its own house did the court begin to issue detailed decrees. The federal court in *Holt II* expressed respect for Arkansas prerogatives and simply ordered officials "to make a prompt and reasonable start toward eliminating" the unconstitutional conditions.[281] Even after a passage of three years, the court of appeals held that Arkansas had not yet provided a constitutional environment within the prisons.[282]

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276. Bell v. Wolfish, 441 U.S. 520, 562 (1979).
277. *See* Hirschkop & Millemann, *supra* note 275, at 835-37.
278. Bell v. Wolfish, 441 U.S. 520, 548 (1979).
279. See Eisenberg & Yeazell, *supra* note 273, at 495-96.
280. 300 F. Supp. 825 (E.D. Ark. 1969) (*Holt I*); 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (*Holt II*).
281. 309 F. Supp. at 383.
282. Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 200 (8th Cir. 1974). The district court in *Holt v. Hutto* noted with approval the changing attitudes and

Certainly, courts should hesitate before becoming involved in continuous litigation and supervision of unfamiliar institutions, but the Constitution does not command that executive and legislative officials be the sole or even final judges of prison conditions.[283] When the prisoners are totally dependent on the government, some branch must be responsive to their needs.

The existence of judicial authority to allocate public funds raises special concerns. Judges demanding improvement of prison facilities have been criticized as intruding into the domain of the legislature, whose province it is to determine the appropriate allocation of limited resources. Criticism of judicial meddling reflects in part the belief that the allocation of resources to correctional facilities is solely a legislative choice.[284] There is also uneasiness about the courts' ability to rank priorities.

But judicial enforcement of individual rights almost always has as a necessary consequence the reallocation of public funds, for that is the ultimate purpose of the litigation.[285] Whether it be the indigent criminal defendant's constitutional plea for counsel at trial[286] or on appeal,[287] or for a free transcript[288] or other specialized assistance,[289] the increased expenditure of public funds is necessary.

Prison litigation involves a more obvious, direct expendi-

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efforts of the legislative, executive, and administrative officials in Arkansas. 363 F. Supp. 194, 198-200 (E.D. Ark. 1973), *aff'd in part, rev'd in part sub nom.* Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974). The Trusty system had been abolished, and widespread unconstitutional conditions were no longer officially sanctioned. The State had acquired law libraries for both institutions and had retained a full-time physician to administer medical aid to the inmates. *Id.*

283. Eisenberg & Yeazell, *supra* note 273, at 499.

284. *See* Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 788 (1978); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 970-71 (1978).

285. *See* Eisenberg & Yeazell, *supra* note 273, at 506-10.

> [T]he orders courts make in institutional cases will, almost inevitably, have as their consequence the increased expenditure of public funds. This fact cannot serve to invalidate institutional litigation, however, because it proves too much. For a judicial order in almost any case has either as its aim or as its consequence the reallocation of resources. That is what litigation is for.

Id. at 507.

286. Gideon v. Wainwright, 372 U.S. 335 (1963).

287. Douglas v. California, 372 U.S. 353 (1963).

288. Griffin v. Illinois, 351 U.S. 12 (1956).

289. Ake v. Oklahoma, 470 U.S. 68 (1985).

ture of public funds. Budgetary considerations about the costly relief required to remedy constitutional violations are often played out in the media. Perhaps, although never directly stated, at the core of the familiar cry of judicial meddling is the belief that criminals have received their rightful punishment and the judiciary should just leave it alone.

Fundamental questions of federal-state relations also arise when federal courts issue decrees that regulate state institutions.[290] Critics fear too much federalism—that litigation involving state prisons has transgressed the rightful authority of the federal judiciary to act. Principles of federalism require a proper respect for state functions and demand that the federal government protect federal rights "in ways that will not unduly interfere with the legitimate activities of the States."[291]

Like the decisions on separation of powers, the federal bench has shown a strong sensitivity to issues of federalism. The comment by Judge Kane is revealing.

> [T]here is, from the beginning of my assignment to this case to the present time, a complete and utter distaste for having to cross that Rubicon which separates the federal government from the state government . . . . [T]he history which I have recounted shows that this circuit and district have shown great deference to prison officials, especially toward the Colorado State Penitentiary and the 150 cases that have been filed from there in the past three years. Nevertheless, the [prisoners] have presented substantial, often compelling, evidence of long existing and continuing constitutional violations. Except in fashioning the necessary relief, deference is no longer possible.[292]

No one even minimally acquainted with prison litigation can honestly suggest that the federal courts have been overeager to interfere with the states' responsibility to administer their prisons or to usurp the legislative or executive task of running prisons.[293] But, "the [federal] courts have learned

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290. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Rizzo v. Goode, 423 U.S. 362 (1976); Younger v. Harris, 401 U.S. 37 (1971). *But cf.* Eisenberg & Yeazell, *supra* note 273, at 501-06 (distinguishing these decisions from most institutional cases).

291. *Younger*, 401 U.S. at 44.

292. Ramos v. Lamm, 485 F. Supp. 122, 132 (D. Colo. 1979), *aff'd in part, set aside in part*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

293. Rhodes v. Chapman, 452 U.S. 337, 354 (1981) (Brennan, J., concurring in

from repeated investigation and bitter experience that [federal] judicial intervention is *indispensable* if constitutional dictates" are going to be observed in our nation's prisons.[294]

"[T]he [wretched] inhumanity of conditions in American prisons has been thrust upon the judicial conscience."[295] Federal courts condemned entire state prison systems as unconstitutional under the Eighth and Fourteenth Amendments.[296] Chief Judge Johnson described in gruesome detail the horrendous conditions in the Alabama penal system.[297] Judge Holloway agreed with the lower court that the conditions in the maximum-security unit of the Colorado State Penitentiary were " unfit for human habitation. "[298] Chief Judge Pettine viewed the "barbaric physical conditions" of Rhode Island's prison system as "the ugly and shocking outward manifestations of a deeper dysfunction, an attitude of cynicism, hopelessness, predatory selfishness, and callous indifference that appears to infect, to one degree or another, almost everyone who comes in contact with the [prison]."[299]

Perhaps the most important schism on the Court is that a majority of the justices assume state legislatures and prison officials are sensitive to the requirements of the Constitution,[300] while the minority point to the sorry history of state prisons and believe that federal judicial intervention is "indispensable" to preserve constitutional rights.[301] Despite limited federal judicial pressure, slow but steady progress toward improving the constitutionality of the conditions of confinement in our nation's prisons has occurred. For the most part, despite their natural reluctance to see the changes come, prison admin-

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the judgment).

294. *Id.*

295. Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 684 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir.), *cert. denied sub nom.* Hall v. Inmates of Suffolk County Jail, 419 U.S. 977 (1974).

296. See *Rhodes*, 452 U.S. at 353 n.1, 354 n.2 (Brennan, J., concurring in the judgment), for a list of the decisions that placed state prisons under court orders.

297. Pugh v. Locke, 406 F. Supp. 318, 322-28 (M.D. Ala. 1976), *aff'd as modified sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds sub nom.* Alabama v. Pugh, 438 U.S. 781 (per curiam), *and cert. denied sub nom.* Newman v. Alabama, 438 U.S. 915 (1978).

298. Ramos v. Lamm, 639 F.2d 559, 567 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

299. Palmigiano v. Garrahy, 443 F. Supp. 956, 984 (D. R.I. 1977), *remanded*, 599 F.2d 17 (1st Cir. 1979).

300. *See* Rhodes v. Chapman, 452 U.S. 337, 352 (1981).

301. *See id.* at 354, 358 n.7 (Brennan, J., concurring in the judgment).

istrators acknowledge the significant part the federal judiciary has played in improving prisons.[302] Judged by the results of the past two decades, the federal judiciary should be proud of its "activist" role. For in the end, the merits do matter.[303]

VI. TOWARD REACHING A MUTUAL ACCOMMODATION

A central theme to prison lore is "the fact that prisoners have privileges, not rights."[304] This is personified by a sign that was posted in the dining room of The Women's House of Corrections in Chicago, Illinois:

> Words were made to be spoken
> Voices were made to be used
> If you speak lightly, and also politely,
> This privilege will not be abused.[305]

Both the Pennsylvania and Auburn systems imposed a rule of absolute silence at all times.[306] Although silence is no longer the norm, other everyday activities that we take for granted such as taking showers, receiving mail, laughing, smoking, and even eating arrangements become matters of reward in prison.

Early in the nineteenth century, a reaction against capital and corporal punishment gave birth to the American penitentiary, an institution marveled at and lavishly praised. By the 1830s, the American penitentiary was world-famous. Yet, by the middle of that century, it was a "conceded failure."[307] Official reports proclaimed that "if human ingenuity were asked to devise means by which the most profligate of men might be rendered abandoned to the last degree of moral infa-

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302. *See, e.g.*, Davis, *supra* note 272, at D1. Judge Anthony Alaimo's rulings "brought sweeping changes to the state's maximum-security prison" at Reidsville, Georgia. Unit supervisor Ronald Fountain, "a 15 year veteran of the state prison," proudly commented that "[t]his is probably the best-equipped institution anywhere." Like others who worked at the state prison, "Mr. Fountain admitted he was initially reluctant to see the changes come." *Id.*

303. Reidsville was "a grim, foreboding place then," noted Judge Alaimo. During his surprise visit to Reidsville, "Judge Alaimo commented favorably on such improvements as the well-stocked law library, the modern medical and dental facilities" and the overall well-tended appearance of the giant prison facility. *Id.* at D6.

304. BURKHART, *supra* note 119, at 144.

305. *Id.*

306. See *supra* text accompanying notes 16-53 for a discussion of the Pennsylvania and Auburn systems.

307. BROCKWAY, *supra* note 64, at 165.

my, nothing more effectual could be invented than the system then in vogue."[308]

Today, as at the beginning, the most serious social consequence of the prison system is the disintegration of the human personality of those committed to its confines. The prisoners suffer from what may be called a loss of autonomy as they are constantly "subjected to a vast body of rules . . . which are designed to control their behavior in minute detail."[309] The deprivation of autonomy represents a serious threat to their self-image as adults. Regulation by a bureaucratic staff is seen by prisoners as pointless authoritarianism designed to bring them to their knees. Public humiliation and enforced respect for endless rules are all done in what is claimed to be the inmates' best interests. While attempting to "reimpose the subservience of youth,"[310] the convicts are told to take their medicine like adults. As the normative form of punishment, imprisonment may not be much of an improvement over corporal punishment. Even public flogging did not contribute to the degradation and disintegration of the human personality as much as conditions do in our prisons today. The Quakers had hoped to replace corporal punishment with solitary confinement, believing it more merciful, but convicts today face both the demoralization of their spirit and wanton acts of physical brutality.

Our prisons increase the already anti-social behavior of their occupants. From the inmates' point of view, prison is a series of status degradation ceremonies. Prison life lends itself to sexual perversions, general physical and moral disintegration, and sporadic rebellion against the system. Almost everything that could contribute to the debasement and demoralization of the human personality has been done in prison.

The modern prison brings into play an anomalous number of disastrous influences. "Normal sociability is severely curtailed; self-assertion is practically denied; interesting work is rarely provided; play and recreation, if existent at all, are grotesquely inadequate."[311] Additionally, the normal sexual out-

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308. *Id.*

309. GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON 73 (1958). *See generally id.* at 63-83.

310. *Id.* at 76.

311. HARRY E. BARNES, THE STORY OF PUNISHMENT 173 (Patterson Smith 2d ed. 1972).

let is totally denied. The effects of all these factors are intensified by the regimentation and emotional cruelty in today's conventional prison setting. As a consequence of the psychological effects inherent in our prisons, the inmates feel conscious resentment toward the system and those who put them into it. The result is not reformed prisoners, but rather persons who are ready to avenge themselves on society.

The inmates in our prisons were, before being locked up, citizens in our democracy. Most will be released. The period of incarceration should be a time to encourage self-reliance and a sense of responsibility. We should spark an interest in the best that our democratic system has to offer. The Court should encourage prison administrators to produce a climate where it is possible for the inmates to develop the traits society would like to see them possess on release from the institution. Unfortunately, the Court has set its compass in a different direction.

Almost any restriction on the inmate may rationally be related to "institutional security" and the "effective management of the detention facility."[312] "Conspicuously lacking from [the Supreme Court's perspective] is any meaningful consideration of . . . the impact that restrictions may have on the inmates."[313] The Court is under an obligation "to examine the actual effect" of the conditions of confinement and restrictions upon the well-being of inmates.[314] Proper attention must also be given to deprivations the inmates suffer. Ultimately, the Court's task is to determine whether the restriction comports with contemporary standards of human dignity.

For example, nowhere are dignity concerns more acutely implicated than in the area of bodily integrity. Intrusive body searches generate feelings of "degradation" and "terror."[315] Visual body cavity examinations engender a fear in inmates of physical and sexual abuse by prison guards.[316] Even though governmental security interests are strongest with respect to preventing dangerous weapons and contraband from entering the prison, the Court should rightfully pause, and then pause

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312. Bell v. Wolfish, 441 U.S. 520, 567 (1979) (Marshall, J., dissenting).

313. *Id.* at 563.

314. Rhodes v. Chapman, 452 U.S. 337, 367 (1981) (Brennan, J., concurring in the judgment).

315. United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 147 (S.D.N.Y. 1977), *aff'd in part, rev'd and remanded in part sub nom.* Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), *rev'd sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979).

316. *Wolfish*, 441 U.S. at 577 (Marshall, J., dissenting).

again, when the net effect of its decision destroys any semblance of humanity that prisoners may hope to retain.

In *Wolfish*, inmates at all Bureau of Prison facilities were routinely required "to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution."[317] The practice was so "unpleasant, embarrassing, and humiliating," and placed inmates in such a degrading position that it caused some of them to forego visits with friends and family altogether.[318] There was testimony that the procedures may leave permanent, psychological scars.[319]

Admittedly, this practice made the Court pause. Neither underestimating the degree to which these searches may invade the personal privacy of inmates, nor that on occasion they may be conducted in an abusive fashion, the Court still permitted them. The Court's balancing test[320] to determine reasonableness under the Fourth Amendment gave way to the one critical factor: "A detention facility is a unique place fraught with serious security dangers."[321] The fact that only one incident of smuggling contraband in body cavities had been discovered was regarded as a testament to its effectiveness rather than an argument against its reasonableness.[322]

There is no doubt that this practice perpetuated the degradation and dehumanization of the inmates. On this most serious issue, Justice Marshall charged that the majority ignored the examination of the particular facts in favor of absolute deference to the warden's interest in institutional security.[323] Did the Court examine the factual record with a view

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317. *Id.* at 558. "If the inmate is a male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates also are visually inspected. The inmate is not touched by security personnel at any time during the visual search procedure." *Id.* at 558 n.39.

318. United States *ex rel.* Wolfish v. Levi, 439 F. Supp. at 147.

319. *Id.*

320. Bell v. Wolfish, 441 U.S. 520, 559 (1979).

> In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id.

321. *Id.*

322. *See id.*

323. *Id.* at 578-79 (Marshall, J., dissenting).

toward reaching a "mutual accommodation," or was it just willing to wholeheartedly endorse the officials' raising the specter of security until they were shown conclusively to be wrong? Were there less invasive methods of satisfying security needs?[324] The dissenters examined the record and found far less necessity for routine body cavity searches.

Before entering the visiting room, all visitors had their packages searched by hand, metal detectors, and a fluoroscope. To secrete contraband into a body cavity, an inmate would have had to remove half of his one-piece, front-zippered jumpsuit, while in plain view of guards who continuously monitored the glass-enclosed visiting room.[325] Moreover, expert medical testimony suggested that inserting an object into the rectum required time and opportunity not available in the visiting room, and that it would be painful. Of equal importance, once inserted, visual inspection probably would not detect the object.[326] Justice Marshall highlighted the bankruptcy of the majority's analysis and found that indiscriminate searches are "so unnecessarily degrading that it 'shocks the conscience.' "[327] Moreover, the lower court found that less restrictive alternatives were available to ensure that contraband was not transferred during visits.[328] Metal detectors could be used to discover weapons. In addition, the prisoners could be strip-searched, their clothing examined, and they could be required to present open hands and arms to reveal the absence of concealed objects.[329] The dissenters agreed with the district court that these alternative procedures "amply satisf[ied] the demands of security."[330]

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324. Justice Rehnquist's sole alternative was to abolish contact visits altogether. *Wolfish*, 441 U.S. at 559 n.40. He expressed no view regarding the constitutionality of prohibiting contact visits for pretrial detainees. In Block v. Rutherford, 468 U.S. 576 (1984), the Court continued to reinforce its severe limitations on detainees, holding that they may be denied contact visits with their spouses, children, relations, and friends. *Id.* at 585-89. Security concerns also permitted the majority to brusquely reject the challenge to the jail's policy of refusing to permit the detainees to observe searches of their cells. *Id.* at 589-91.

325. *Wolfish*, 441 U.S. at 577-78 (Marshall, J., dissenting). To further security, the locked lavatories were forbidden to the inmates, and the visitors could only use them with permission. The lavatories also contained a built-in window for inspection. *Id.* at 578 n.18.

326. *Id.* at 578.

327. *Id.* at 578-79 (quoting Rochin v. California, 342 U.S. 165, 172 (1952)).

328. United States *ex rel.* Wolfish v. Levi, 439 F. Supp. at 147-48 (finding even anal searches ineffective).

329. *Id.* at 147.

330. *Wolfish*, 441 U.S. at 576-79 (Marshall, J., dissenting); *id.* at 595 (Stevens,

Humiliation had been an objective of the failed early systems.[331] In order to maintain silence in the movement of large numbers of inmates about prisons, the Auburn system had subjected prisoners to the degradation of the lockstep. Prisoners were out of step with society, and their physical movements were to be made as graceless as possible. Each prisoner moved silently, in a shuffle, his "right arm outstretched with the hand on the right shoulder of the man in front of him."[332] Prisoners were "not permitted to hold their heads up, as would befit free men."[333] With their heads turned to the right, and their eyes cast downward as they shuffled forward, they were constantly reminded of their low estate.[334]

We should reject the past and preserve human dignity in prison. Current prison practices that blithely contribute to the prisoners' virtual degradation by design or neglect are to be condemned. It is difficult to believe that the reason for the visual body cavity search is solely for security and not also to purposefully demoralize and humiliate the inmate.

The Court's policy has allowed not only degradation but also deprivation of the very elements needed to reform the prisoner. The "hands-off" doctrine had failed the prisoners by abdicating jurisdiction. The deferential model likewise fails by abandoning the Court's responsibility.

O'Lone v. Estate of Shabazz[335] highlights the substitution of judicial rhetoric for any meaningful scrutiny of prisoners' constitutional claims. The Court's analytical framework completely prevented the inmates from attending the central religious service of their Muslim faith. Rather than trying to reach a mutual accommodation, the Court's "reasonableness" standard became nothing more than "reflexive deference to prison officials."[336]

"Religion represents a rich resource in the moral and spiri-

J., dissenting). Justice Powell joined the majority except with respect to body-cavity searches. He stated that the serious intrusion on one's privacy occasioned by anal and genital searches required "at least some level of cause, such as a reasonable suspicion." *Id.* at 563 (Powell, J., concurring in part and dissenting in part).

331. HARRY E. BARNES & NEGLEY K. TEETERS, NEW HORIZONS IN CRIMINOLOGY 351 (3d ed. 1959).

332. ATTICA, *supra* note 38, at 10.

333. *Id.* at 11.

334. *Id.*

335. 482 U.S. 342 (1987); see *supra* text accompanying notes 248-58 for a discussion of *O'Lone*.

336. *O'Lone*, 482 U.S. at 367 (Brennan, J., dissenting).

tual regeneration of mankind,"[337] and in prison it serves a rehabilitative function. The Quakers, who began the reform movement, believed in the reformation of the inmate's spirit through religious study and repentance. Although all contact with fellow prisoners and community was prevented, prisoners in the Pennsylvania system were given religious instruction by ministers. Even the stern Auburn system applied the accepted doctrine that criminals in prison should be provided with religious services.[338] Religion provides the means to spiritual recovery by which "the inmate may reclaim his dignity and reassert his individuality."[339]

The *O'Lone* Court's task was to frame society's values, giving the fullest measure of constitutional protections consistent with institutional needs. Muslim inmates are permitted to take part in Jumu'ah throughout the entire federal prison system. Moreover, the Leesburg state prisoners had, for five years, been permitted to participate in the Jumu'ah without creating any threats to security or to the safety of the institution.[340] Considering Leesburg's experience, the standard federal practice, and given the institution's responsibility to provide Muslims with a "reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts,"[341] surely the Court could have found a mutual accommodation to satisfy all needs. The Muslim prisoners had proposed plausible alternatives that federal prisons and other courts, in strikingly similar circumstances, had accepted.[342]

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337. AMERICAN CORRECTIONAL ASS'N, MANUAL OF CORRECTIONAL STANDARDS at xxi (3d ed. 1966) (preamble principle XVII).

338. *See* ROTHMAN, *supra* note 2, at 104.

339. Barnett v. Rodgers, 410 F.2d 995, 1002 (D.C. Cir. 1969).

340. *O'Lone*, 482 U.S. at 366 (Brennan, J., dissenting).

341. Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam).

342. *O'Lone*, 482 U.S. at 361, 363-67 (Brennan, J., dissenting). The prisoners alternatively proposed that Muslim inmates "be assigned to an alternative inside work detail on Friday," *id.* at 363; that they "be assigned to work details inside the main building on a regular basis," *id.* at 364; that they "be assigned to Saturday or Sunday work details," *id.* at 365 (this would allow them to make up time lost by attending Jumu'ah on Friday); or that minimum-security inmates "be assigned to jobs either in the Farm building or in its immediate vicinity," *id.* at 365-66 & n.6 (this would avoid increasing congestion at the main gate, a concern underlying the no-return policy).

"Muslim inmates are able to participate in Jumu'ah throughout the entire federal prison system." *Id.* at 362. Federal Bureau of Prisons regulations and directives require that "the more central the religious activity is to the tenets of the

The Pennsylvania advocates were convinced that separating the convicts from all evil influences and corrupt companions was the key to their rehabilitation. To fulfill this goal, they severed every tie between the prisoners and the community and sought to block out reports of outside events.[343] Thus they were kept in complete isolation. The Auburn system was as devoted as Pennsylvania to the idea of isolating the prisoners from each other and from the outside world. The "silent system" contemplated an end to free communication within the penitentiary. The prisoners were rarely allowed to communicate or visit with their families.[344] The prisoner "was taught to consider himself dead to all without the prison walls."[345]

Today's theory is totally contrary to the early view. Authorities that deal closely with penal reform counsel correctional institutions "to maximize visiting opportunities for inmates."[346] The decrease of recidivism and the subsequent reentry of the inmate into society may well depend upon his maintaining ties to the community. Of equal importance to the inmate and his relatives is that the family unit remain intact.

Admittedly, there may be valid reasons to believe that visitation rights have been abused in a particular case, and prison officials should take reasonable steps to investigate and to correct that situation. The inmates in *Kentucky Department of Corrections v. Thompson*, however, did not ask for unfettered visitation, but merely for rudimentary procedural safeguards against retaliatory or arbitrary denial of visits from family and friends.[347]

The *Thompson* Court's answer was that visits could be denied without justification. The Court gave correctional authorities unbridled discretion over the "basic human need" of

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inmate's religious faith, the greater the presumption is for relieving the inmate from the institution program or assignment." *Id.* at 362 (citing respondent's brief at 8a). Furthermore, the Chaplain Director of the Bureau stated that "[i]n those institutions where the outside work details contain Islamic inmates, they are permitted access to the inside of the institution to attend the Jumu-ah." *Id.* at 362 (citing respondent's brief at 1a).

343. ROTHMAN, *supra* note 2, at 94-95. Interestingly, in the early English and American jails, widespread visitation practices were permitted. *See* Leverson, *supra* note 16, at 413-15.

344. ROTHMAN, *supra* note 2, at 94-95.

345. *Id.* at 95.

346. FEDERAL STANDARDS FOR PRISONS AND JAILS § 12.12 (U.S. Dep't of Justice 1980); *see also* Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 468 n.4 (1989) (citing additional authorities).

347. *Thompson*, 490 U.S. at 475 (Marshall, J., dissenting).

the prisoner to see his family and friends.[348] Consequently, today, visitation remains merely a privilege.[349]

The continued necessity for correctional personnel to exercise broad discretion in maintaining order and security cannot be questioned. Respect for state institutions and administrative guidance is relevant in prison litigation. But, the slow pace of prison litigation and the substantial guidance sought and secured from correctional officials in framing adequate procedures manifest sufficient deference to the states and prison administrations.[350] The fundamental question is not that of respect, but of who should make the final determination about the conditions our fellow citizens face while incarcerated. To permit the states and prison authorities to do so is to abdicate federal judicial responsibility.

The Supreme Court, by failing to act, legitimizes the status quo. By setting unrealistic barriers for review of Eighth Amendment rights, the Court discourages constitutional inquiry and encourages abuse.[351] The gravamen of the Eighth Amendment is the effect upon the imprisoned. Humane considerations and constitutional requirements are not to be measured by the public fisc. Charged with the duty of enforcing the Constitution, the federal courts must continue to be available to force the states to correct their unconstitutional prison conditions. If *Wilson*'s deliberate indifference theory is employed to insulate judicial review because conscientious prison administrators seek to improve their facilities, even while state legislatures refuse to spend scarce tax dollars to bring conditions in outdated prisons up to minimally acceptable standards,[352]

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348. *Id.* at 466.

349. See *supra* text accompanying notes 263-68 for a discussion of *Thompson*. In prison, even the quantity of sugar or milk in coffee is a privilege of some consequence:

> "I went to get sugar for my oatmeal," Marlene Riffert says. "I took a spoonful and then the matron came up and took my bowl away and threw the cereal in the garbage. I was so shocked, I didn't say anything, I just looked at her. She said, 'You know you already used sugar in your coffee.' I was given three nights' early bed." Marlene had violated a sacrosanct rule at the House of Correction in Philadelphia: she attempted to use sugar in her coffee *and* on her cereal at breakfast. Her option was one or the other, not both.

BURKHART, *supra* note 119, at 144-45.

350. Eisenberg & Yeazell, *supra* note 273, at 506.

351. *See* Hirschkop & Millemann, *supra* note 275, at 835-37.

352. *See* Wilson v. Seiter, 111 S. Ct. 2321, 2331 (1991) (White, J., concurring in the judgment).

then imprisonment will be an open door for cruelty and neglect. But, if deliberate indifference may be satisfied by showing a legislative failure to reevaluate its correctional policy and correct some of its worst penal systems, then it will not impede prison reform. The history of prison litigation attests to this assertion.

When evaluating whether prison conditions pass constitutional muster, the touchstone should be the actual effect upon the well-being of the imprisoned. In performing this responsibility, the courts must carefully scrutinize the challenged condition, applying realistic yet humane standards.[353] The cumulative impact of the conditions of incarceration that threaten the physical and emotional health of the inmates, and not the budget, should determine whether the conditions violate the Constitution.[354]

The model the Court uses and its standard of review for prison regulations also have fundamental consequences. When the standard may be satisfied by merely showing a " 'logical connection' between the regulation and any legitimate penological concern perceived by a cautious warden," then "it is virtually meaningless."[355] A prisoner's constitutional rights should not be disregarded whenever the warden can articulate a plausible security concern.[356]

It is ironic that although this Article argues for a greater judicial role, it is the Supreme Court, as final arbiter, that has continuously impeded the efforts of the lower federal courts to

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353. Rhodes v. Chapman, 452 U.S. 337, 361 (1981) (Brennan, J., concurring in the judgment).

354. In *Rhodes*, Justice Brennan noted:

> The court must examine the effect upon inmates of the condition of the physical plant (lighting, heat, plumbing, ventilation, living space, noise levels, recreation space); sanitation (control of vermin and insects, food preparation, medical facilities, lavatories and showers, clean places for eating, sleeping, and working); safety (protection from violent, deranged, or diseased inmates, fire protection, emergency evacuation); inmate needs and services (clothing, nutrition, bedding, medical, dental, and mental health care, visitation time, exercise and recreation, educational and rehabilitative programming); and staffing (trained and adequate guards and other staff, avoidance of placing inmates in positions of authority over other inmates).

452 U.S. at 364 (Brennan, J., concurring in the judgment).

355. Turner v. Safley, 482 U.S. 78, 100 (1987) (Stevens, J., concurring in part and dissenting in part).

356. *Id.* at 100-01.

further prison reform. If the Court is sincere in its proclamation that prison walls are not barriers separating inmates from constitutional protections,[357] then it must demand more of the warden. Considerations of security and administrative expense are factors to weigh, but are not necessarily dispositive. A limitation on constitutional rights requires more than a "reflexive deference to prison officials."[358] The basic premise is that prisoners, as members of society, retain constitutional rights that limit the exercise of official authority aimed against them.[359] An approach more sensitive to the retained rights of the inmate is required. An open mind to alternative methods of accommodating constitutional concerns, with a view that any limitation on freedom should be no greater than absolutely necessary to accomplish the correctional needs, is more in accord with the Court's declared commitment.[360] Although the regulation may be "reasonable," there may be better alternatives.

Regulations that unnecessarily degrade the prisoner, limit his access to family and friends, restrict his desire to worship, and frustrate his ability to gain a modicum of self-respect, ill prepare him for his return to society. At a minimum, the prisoner retains the right to be treated with human dignity. When this right is no greater than the warden chooses to permit, then surely the prisoner is still not much better than the past century description of him as "the slave of the State."[361]

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357. *Turner*, 482 U.S. at 84.

358. O'Lone v. Estate of Shabazz, 482 U.S. 342, 367 (1987) (Brennan, J., dissenting).

359. *Id.* at 355.

360. See Part I of Justice Brennan's dissent in *O'Lone*, 482 U.S. at 354-59 (Brennan, J., dissenting). Judge Kaufman in Abdul Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985), believed that the prison official must show that "a particular restriction is necessary to further an important governmental interest, and . . . the limitations on freedoms occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved." *Id.* The degree of scrutiny should depend upon "the nature of the right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation (as opposed to a mere limitation) on the exercise of that right." *Id.*

361. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871). Our prison population is predominantly black, and black prisoners, with their increased sensitivity to black slave history, have perceived the close analogy between imprisonment and slavery. *See* Herman Schwartz, *Prisoner's Rights: Some Hopes and Realities*, *in* ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, A PROGRAM FOR PRISON REFORM 56 (1972).